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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNISYS CORPORATION,
Petitioner,

v.

GERALD E. PICKERING, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3), permit individual ERISA plan participants and beneficiaries to sue on their own behalf, and not on behalf of an ERISA plan, for alleged breaches of fiduciary duty under ERISA?

2. When an ERISA-governed welfare benefit plan provides that participants are eligible for benefits under the plan for life and also expressly reserves the employer's right to terminate, amend or modify the plan, and when that reservation of rights is properly and unambiguously disclosed to plan participants and beneficiaries in a summary plan description, may liability nonetheless be imposed under ERISA § 404(a), 29 U.S.C. § 1104(a), for breach of fiduciary duty when the employer does not remind a plan participant at the time of retirement that the plan is subject to amendment or termination?

PARTIES TO THE PROCEEDINGS

The Petitioner is Unisys Corporation. The Respondents are Gerald E. Pickering, Fred Tonnies, William Leonhardt, Evelyn Schmidt, Dudley Keyes, David Kahl, Paul Wright, Robert Wilt, Clay Bernichon, Edward Valle, Robert B. Welsh, Solveig Tschann, Bernard J. Jansen, Donald I. Klippenstein, Frederick W. Hoppe, Ludson F. Worsham, Edwin Marjala and Warren J. Hall, individually and on behalf of all members of the Sperry Class previously certified by the district court whose claims have not been settled.

RULE 29.1 STATEMENT

Unisys Corporation has no parent. Its subsidiaries, other than wholly-owned subsidiaries, are Nihon Unisys Ltd. and Oki Unisys Kaisha, Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Unisys Corporation ("Unisys"), by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals that is the subject of this petition (App. 1a-26a) is reported at 57 F.3d 1255. A related opinion of the court of appeals which has some bearing on this petition (App. 133a-155a) is reported at 58 F.3d 896. The opinion of the district court originally granting summary judgment in favor of Unisys on the breach of fiduciary duty claims addressed in this petition (App. 100a-120a)

is reported at 837 F. Supp. 670. The opinion of the district court reinstating the breach of fiduciary duty claims (App. 28a-99a) is reported at 1994 WL 284079.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are: 29 U.S.C. §§ 1002(1); 1002(5); 1002(16); 1002(19); 1002(21)(A); 1021-25; 1102; 1104(a); 1108(c); 1109(a); 1113; 1132(a); and 1132(c). They are reproduced in the appendix at App. 156a-186a.

STATEMENT OF THE CASE

On November 3, 1992, Unisys announced that it was terminating, effective January 1, 1993, the numerous welfare benefit plans under which Unisys and its predecessors, Sperry and Burroughs Corporations,[1] had provided medical coverage to retired employees and their eligible dependents. Unisys replaced those plans with the new Unisys Post-Retirement and Extended Disability Medical Plan, which required increasing levels of contributions from plan participants. That decision, which was based on compelling and legitimate business considerations, was subsequently challenged under ERISA by several groups of retirees, who alleged that their medical benefits were vested. This petition involves the breach of fiduciary duty claims of Sperry retirees and of Unisys retirees who had been employed by Sperry and retired on or before April 1, 1989 ("the Sperry regular retirees"). The Sperry regular retirees are seeking, *inter alia,* reinstatement of the medical benefits they were receiving under the terminated plans.

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1. Unisys was created in September, 1986 as a result of the merger of Sperry and Burroughs Corporations.

Factual Background

Both the district court and the court of appeals held that the Sperry regular retirees were not entitled to vested medical benefits under the terms of the applicable plans, and that Unisys' decision to terminate those plans did not violate section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). App. 66a-80a, 144a-151a. These holdings were based primarily on the fact that Sperry and Unisys had distributed to plan participants summary plan descriptions which, while stating that retiree medical coverage would continue "for life," unambiguously reserved in the company the right to amend or terminate the medical benefit plans at "any time" or for "any reason." [2] A typical reservation of rights clause provided:

> Plan Continuation
>
> The Company expects to continue the Plans, but reserves the right to change or end them *at any time*. The Company's decision to change or end the Plans may be due to changes in federal or state laws governing welfare or retirement benefits, the requirements of the Internal Revenue Code or ERISA, the provisions of a contract or a policy involving an insurance company or *any other reason*. A Plan change may transfer Plan assets and liabilities to another Plan or split a Plan into two or more parts. If the Company does make a change or ends a Plan, it may decide to set up a different Plan providing similar or identical benefits.

(emphasis added).

Thus, the "lifetime" coverage available to plan participants, like the other terms of the plan, existed only so long as the plan continued, and was subject to the company's right to modify the plan or to terminate the plan altogether. As the court of appeals stated in the companion decision in which it rejected the Sperry regular retirees' non-fiduciary claims:

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2. Under ERISA, an employer has a statutory right "for any reason at any time, to adopt, modify or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995).

> An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist. In this case, the Sperry retirees' eligibility for benefits was qualified because it was subject to Unisys' reserved right to terminate the plan under which those benefits were provided.

App. 147a (emphasis in original).

In addition to the provisions of the summary plan descriptions, information about retiree medical and other benefits was also given to certain employees at the time of their retirement through various informal oral and written communications. These communications generally took place in a context repeated many times daily in American business, where an employee contemplating retirement discusses various aspects of that decision, including benefits, with representatives of his employer. Some retirees testified that they were provided with information about medical benefits in response to questions they raised about the duration of their medical benefit coverage, while others testified that the issue never arose. Many of the retirees testified that, although they had received a summary plan description, they had not read it. In a number of the informal communications, the duration of medical benefits was described as being "for life" or for the "lifetime" of the retiree, just as it was in the summary plan descriptions; however, the company's right to amend or terminate its benefit plans was not repeated in these communications.

It is these informal communications upon which the Sperry regular retirees' breach of fiduciary duty claims are based. Many of the retirees claim that prior to the time they retired they were "affirmatively and systematically" advised by the company of precisely what was in the summary plan descriptions — that they were entitled to "lifetime" medical

benefits following their retirement.[3] They claim that, notwithstanding the reservation of rights clause in the summary plan descriptions, they interpreted these "lifetime" statements as an indication that their benefits "locked in" at retirement, that the company was aware of this interpretation, and that the company breached its fiduciary duty as the plan administrator [4] by failing to remind retirees of what they already had been told in writing — that the company had the right to amend or terminate the plans under which their "lifetime" medical benefits were provided.

It is undisputed that at the time of these informal communications, all of which were made prior to April 1, 1989, no one at Sperry or Unisys intended or anticipated that Unisys would terminate its retiree medical benefit plans in November, 1992. App. 19a n.15. There is also no evidence that Sperry or Unisys acted fraudulently or in bad faith in their dealings with the Sperry regular retirees. App. 117a-118a, 123a.

The Proceedings And Decisions In The District Court

This consolidated litigation comprises nine actions brought by representatives of three classes of retirees, all of whom originally alleged that Unisys, Burroughs and Sperry waived their inherent right to terminate their retiree medical benefit plans by purportedly promising retirees vested, nonforfeitable medical coverage. The retirees asserted three types of claims against Unisys under ERISA — violation of the terms of the applicable benefit plans, breach of fiduciary duty and promissory estoppel. The nine cases were consolidated for pretrial proceedings in the United States District

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3. The evidence on this issue differed from retiree to retiree. For that reason, Unisys has argued, and the district court and the court of appeals have agreed, that it may be necessary to hold individual hearings to determine whether a breach of fiduciary duty occurred under the theory advanced by the Sperry regular retirees. App. 10a n.8, 85a.

4. Section 408(c)(3) of ERISA authorizes an employer to act simultaneously as a plan sponsor and plan administrator. 29 U.S.C. § 1108(c)(3).

Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1407, and ultimately consolidated for trial by the district court.

Prior to trial, however, the district court granted Unisys' motion for partial summary judgment on all claims of the Unisys and Burroughs regular retirees and on the estoppel and breach of fiduciary duty claims of the Sperry regular retirees. The district court denied Unisys' motion, however, with respect to the claim of the Sperry regular retirees under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), that they were entitled to vested medical benefits under the terms of the governing plans. App. 119a, 120a. Consequently, those claims, as well as the claims of certain retirees who retired pursuant to one of several early retirement incentive programs ("early retirees"), were tried before the district court.

Following the trial, the district court issued a decision in which it concluded that the Sperry regular retirees had failed to establish that they were entitled to vested medical benefits under the terms of the plans.[5] App. 66a-80a. Nonetheless, in response to a motion for reconsideration made at trial, the district court reinstated the breach of fiduciary duty claims of the Sperry regular retirees, claims on which Unisys had been granted summary judgment earlier in the case. App. 80a-86a, 99a. In support of its conclusion that the Sperry regular retirees should be permitted to pursue their breach of fiduciary duty claims, the district court relied on a decision of the court of appeals issued during the course of trial, *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund,* 12 F.3d 1292 (3d Cir. 1993). The district court acknowledged, however, "the uncertainty of the contours of *Bixler*," and the possibility that individual hearings might be necessary to adjudicate the fiduciary duty claims of the approximately 9,000 Sperry regu-

5. The district court also entered judgment in Unisys' favor on the claims of the Unisys early retirees. App. 86a-96a. The claims of the Sperry and Burroughs early retirees were settled after trial, but before the district court issued its decision on the merits. App. 28a n.2.

lar retirees. App. 86a. Accordingly, the district court certified two issues for immediate appeal:

> (a) May a breach of fiduciary duty claim be maintained under ERISA where:
>
> (1) the applicable summary plan descriptions ("SPDs") informed class members that the duration of retiree medical benefits was for life, but reservation clauses in the SPDs stated that the company reserved the right to terminate the plans at any time and for any reason; and
>
> (2) company representatives misinformed class members that once they retired, their medical benefits would continue for life, as detailed in the Court's opinion of June 23, 1994?
>
> (b) Assuming that a breach of fiduciary duty claim may be maintained under the above circumstances, is equitable relief available to individual participants under ERISA?

App. 128a. The court of appeals granted Unisys' petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).[6] App. 129a.

The Court Of Appeals' Decision

Five separate appeals were presented to the court of appeals: Unisys' interlocutory appeal relating to the Sperry regular retirees' breach of fiduciary duty claims; appeals filed by the Sperry regular retirees, by the Burroughs and Unisys regular retirees, and by the Unisys early retirees from the final orders entered in Unisys' favor; and an appeal challenging the fairness of the settlement reached on the claims of the Sperry

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6. In light of *Bixler*, the Burroughs and Unisys regular retirees also moved for reconsideration of the district court's decision granting summary judgment in Unisys' favor on their breach of fiduciary duty claims. That motion has been held in abeyance by the district court pending the disposition of Unisys' interlocutory appeal. App. 130a-132a.

and Burroughs early retirees. The court of appeals issued five separate decisions, affirming the district court in all respects.[7]

In the decision that is the subject of this petition, the court of appeals acknowledged that Sperry and Unisys, as plan administrators, had satisfied their statutory disclosure obligations under ERISA by distributing to plan participants summary plan descriptions. App. 14a-16a. Indeed, the court of appeals held that the Sperry regular retirees were not entitled to vested medical benefits under the terms of the applicable plans "due to the unambiguous language of the reservation of rights clauses." App. 17a n.13. It "accept[ed] Unisys' contention that at the time lifetime benefits were promised, no one at Sperry ever intended or anticipated that there would one day be the need to reduce or eliminate retiree medical benefits." App. 19a n.15. It did not disturb the district court's finding that there was no evidence of fraud or bad faith on the part of the company. And, in its companion decision rejecting the Sperry regular retirees' plan-based and estoppel claims, the court of appeals held that the retirees' interpretation that they were "promised vested benefits" was unreasonable as a matter of law "because it cannot be reconciled with the unqualified reservation of rights clauses in the plans." App. 154a.

Remarkably, however, in light of the above holdings, the court of appeals affirmed the district court's decision to reinstate the breach of fiduciary duty claims of the Sperry regular retirees. In reaching this conclusion, the court of appeals focused on the company's use of the terms "lifetime" or "for life" in some of its informal communications with plan participants to describe the duration of retiree medical coverage. App. 9a-10a, 16a-17a. Although this description was completely consistent with the "lifetime" durational provision in the applicable summary plan descriptions, the court of appeals

7. The decisions relating to the claims of the Burroughs and Unisys regular retirees, the claims of the Unisys early retirees, and the challenge to the settlement agreement are not reported and have no bearing on this petition.

concluded that these "lifetime" statements amounted to "material misrepresentations" regarding retiree medical coverage because they were not coupled with a reminder that the plans could be amended or terminated. App. 16a-17a. Relying on evidence that Sperry had knowledge that some plan participants were confused as to whether their benefits could be modified once they retired, the court of appeals held that the company had an obligation to "correct the misinformation" by advising plan participants of what had already been disclosed to them in their summary plan descriptions — that their "lifetime" medical benefits were subject to amendment or termination. App. 20a-21a. The court of appeals cited with approval the following passage from the district court's opinion:

> "Unisys could have easily put an explicit [reservation of rights clause] in each informal communication given to employees rather than only use the lifetime language; also, when employees made specific inquiries to benefit counselors during exit interviews and at group retirement sessions, the company could have instructed the counselors to tell prospective employees that although the word 'lifetime' is used, the company always reserves its right to terminate the plans."

App. 10a n.7.

The court of appeals then turned to the issue of remedy. Citing its earlier decision in *Bixler*, the court of appeals held that individual relief is available to the Sperry regular retirees, if they can prove their individual claims for breach of fiduciary duty at trial, under section 502(a)(3) of ERISA. Recognizing that the form of equitable relief available under section 502(a)(3) had not been defined in *Bixler*, the court of appeals suggested that the following remedies "are restitutionary in nature and thus equitable":

> an injunction ordering specific performance of the assurances Unisys made, restitutionary reimbursement for back benefits, and restoration of the *status quo ante* for the Sperry early retirees by rescinding their retirement agreements.

App. 25a-26a.[8] In short, the court of appeals held that even though the Sperry regular retirees were not entitled to vested medical benefits under the terms of the applicable plans, Unisys may nonetheless by required to provide them with such benefits as a remedy for its alleged breach of fiduciary duty.

REASONS FOR GRANTING THE PETITION

This Case Should Be Heard In Tandem With *Varity Corp. v. Howe* So That The Court Can Clarify, Without Being Limited By The Unique Facts In *Varity*, The Scope Of A Plan Administrator's Fiduciary Disclosure Obligations And The Role Of A Summary Plan Description In Satisfying Those Obligations.

The first question presented in this petition — whether individual plan participants and beneficiaries can sue on their own behalf for alleged breaches of fiduciary duty under section 502(a)(3) of ERISA — is identical to one of two questions raised in a case in which this Court already has granted certiorari, *Varity Corp. v. Howe,* 115 S. Ct. 1792 (1995)(No. 94-1471).[9] Indeed, if this were the only question presented,

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8. In making this suggestion, the court of appeals purported to distinguish this Court's opinion in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993). The court of appeals' suggestion that the rescission of a retirement decision is a proper remedy for a breach of fiduciary duty is particularly troubling from a policy perspective under ERISA. A company does not act as a plan administrator, of course, in hiring an employee, and there is no rational or legal basis for ordering the establishment of an employment relationship with a company acting in a *non-fiduciary* capacity — an employer — as the result of an alleged breach of duty by the company when purportedly acting in a *fiduciary* capacity as plan administrator. This type of imprecision by the court of appeals in its interpretation of ERISA highlights the need to define narrowly the scope of fiduciary conduct under ERISA, as suggested by Petitioner in *Varity Corp. v. Howe,* 115 S. Ct. 1792 (1995) (No. 94-1471), and to recognize that an employer does not assume a fiduciary mantle every time it mentions a pension or welfare benefit to an employee.

9. The issues to be heard by the Court in *Varity* are: (1) "[d]oes the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to sue on their own behalf, and not on behalf of an ERISA

Unisys would be asking the Court to hold the petition until *Varity* is decided, and thereafter remand the case to the court of appeals for further proceedings consistent with *Varity*.

Unisys is requesting, however, that its petition be granted and that this case be heard in tandem with *Varity*. The second question presented by this petition, while quite similar to the second question in *Varity*, arises from a distinctly different set of facts. Specifically, in *Varity*, the communications that the Eighth Circuit held gave rise to a breach of fiduciary duty *related to subjects that were not addressed in a summary plan description.* The Eighth Circuit's holding was grounded in the district court's finding that the employer had made "fraudulent misrepresentations" as part of a " 'scheme designed, in part, to rid defendants of the obligations to pay benefits to retirees and employees. . . .' " *Howe v. Varity Corp.*, 36 F.3d 746, 749-50, 753 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 1792 (1995) (No. 94-1471). These misrepresentations related to the future viability of a new corporate entity into which plan participants were induced to transfer, the new entity's business outlook, and the employer's expectation as to whether its benefit programs would remain unchanged in the future. *Id.* at 749-50. There was no information regarding these subjects provided to plan participants in the summary plan description.[10] Accordingly, the Eighth Circuit held that

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plan, for alleged breaches of fiduciary duty under ERISA"; and (2) "[w]hen an ERISA-governed welfare benefits plan expressly reserves the right to terminate, amend or modify the plan, and when that reservation of rights is disclosed to plan participants and beneficiaries, may liability nonetheless be imposed under ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993), for breach of fiduciary duty, where an employer fails to disclose its expectation that at some point in the future benefits will be terminated?" Brief of Petitioner Varity Corporation at p. i.

10. Although the summary plan description had a reservation of rights clause, it did not disclose that Varity Corporation was in fact considering terminating its benefit obligations to employees who transferred into the new corporate entity. *Id.* at 751-52.

the employer's disclosures in the summary plan description did not foreclose the plan participants' claim for breach of fiduciary duty.[11] *Id.* at 753.

In this case, by contrast, the court of appeals held that Sperry and Unisys may have had a fiduciary duty to provide information to plan participants *that already had been disclosed in a summary plan description.* Specifically, the court of appeals concluded that Sperry and Unisys should have coupled their informal oral and written descriptions of the lifetime medical benefits available to retirees with a reminder that those benefits were subject to amendment or termination. Although the court of appeals described these "lifetime" statements as "material misrepresentations," they were accurate descriptions of the plans as they existed at the time those statements were made. Sperry and Unisys simply did not qualify those statements with a reiteration of the company's right to amend or terminate its benefit plans, a right that previously had been disclosed to plan participants in an unambiguous reservation of rights clause in their summary plan descriptions. There was no evidence of fraud on the part of Sperry or Unisys, and no "scheme" to rid the company of its obligation to provide benefits. Moreover, it is undisputed that at the time the "lifetime" statements were made, there was no expectation that Unisys would be terminating its retiree medical benefit plans in November, 1992.

Thus, this petition provides the Court with an opportunity to resolve an issue of profound importance to the administration of employee welfare benefit plans, an issue not squarely presented in *Varity.* That issue is whether a plan administrator can be held liable for a breach of fiduciary duty for alleg-

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11. The employer in *Varity* has correctly argued to this Court that its communications regarding these business-related issues did not constitute fiduciary conduct. Brief of Petitioner Varity Corporation at pp. 29-41. Unisys likewise submits that the court of appeals in this case erred in concluding that Unisys acted as a fiduciary when it discussed with its employees, as it was entitled to do, an important aspect of the *employment* relationship — benefits. As plan administrator, Unisys' fiduciary conduct regarding communications with plan participants began and ended with the proper completion of its mandatory disclosure obligations under ERISA.

edly failing to disclose informally the very same information that it has already fully, properly and unambiguously disclosed in the manner directed by Congress — a summary plan description. Here, the court of appeals held that compliance with the law is not enough, and that the plan administrator has a fiduciary obligation to consider each participant's particular circumstances and to repeat the contents of the summary plan description informally where necessary. If that holding is accepted, a plan participant will be able to circumvent the written terms of a plan, and obtain more than he or she is entitled to under the plan, by ignoring the summary plan description,[12] claiming confusion regarding the plan's terms, and alleging that the employer failed to address that confusion, or exacerbated that confusion, through its informal oral and written communications.[13]

There are a number of compelling reasons why certiorari should be granted to review this holding of the court of appeals. First, the court of appeals' decision is utterly inconsistent with the uniform disclosure scheme envisioned by Congress when it enacted ERISA. Indeed, this Court recently

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12. The record in this case is replete with the testimony of plan participants who admitted that they had either ignored the summary plan descriptions provided to them, or failed to read them carefully enough to understand that Sperry and Unisys had the right at "any time" or for "any reason" to amend or terminate their benefit plans.

13. This issue has more than theoretical significance. It is not just the Sperry regular retirees who are pursuing this course. The breach of fiduciary duty claims of more than 9,000 plan participants and beneficiaries of Burroughs Corporation who began receiving retiree medical benefits on or before April 1, 1989 are being held in abeyance by the district court pending the disposition of Unisys' interlocutory appeal, as are the claims of some 3,500 plan participants and beneficiaries of Unisys who began receiving retiree medical benefits after April 1, 1989. Additionally, Unisys' counsel are involved in at least three other cases in which large classes of plan participants and beneficiaries have relied on the expansive fiduciary duty of disclosure imposed by the court of appeals in this case to challenge modifications of their welfare or pension benefits. *See Gluck v. Unisys Corp.*, No. 90-1510, 1995 WL 498730 (E.D. Pa. Aug. 21, 1995); *Schmidt v. Board of Trustees of the Iron Workers Dist. Council Philadelphia and Vicinity*, No. 94-7700 (E.D. Pa. filed Dec. 23, 1994); *Young v. IMO Indus., Inc.*, No. 94-12508 (D. Mass. filed Dec. 16, 1994).

rejected a similar attempt to expand an employer's fiduciary disclosure obligations beyond the specific written disclosure requirements set forth in ERISA. In *Curtiss-Wright Corp. v. Schoonejongen,* 115 S. Ct. 1223 (1995), this Court reversed the Third Circuit's holding that a clause in a medical benefit plan that provided that "[t]he Company reserves the right at any time to modify or amend the plan" was an invalid amendment procedure under section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3). Among the arguments raised by the plan participants in support of the Third Circuit's holding that the amendment procedure was invalid was that section 402(b)(3) imposes a fiduciary duty on a plan administrator to provide enough detail in the plan amendment procedure "to enable beneficiaries to learn their rights and obligations under the plan at any time." 115 S. Ct. at 1230. This Court expressly rejected this argument, relying upon the existence in sections 101 through 105 of ERISA, 29 U.S.C. §§ 1021-1025, of provisions that ensure that plan participants are properly informed by the plan administrator of a plan's terms. The statutory provisions upon which the Court relied are the very provisions that recognize the primacy of written plan documents and the fundamental role of a summary plan description:

> Respondents are no doubt right that one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time. But ERISA already *has* an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents. The basis of that scheme is another of ERISA's core functional requirements, that "[e]very employee benefit plan shall be established and maintained *pursuant to a written instrument.*"... ERISA gives effect to this "written plan documents" scheme through a comprehensive set of "reporting and disclosure" requirements . . . of which § 402(b)(3) is not part. One provision, for example, requires that plan administrators periodically furnish beneficiaries with a Summary Plan Description . . . the purpose being to communicate to beneficiaries the essential information about the plan.

Id. at 1230 (citations omitted and emphasis in original). The Court then concluded:

> This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be supplemented by a far-away provision in another part of the statute, least of all in a way that would lead to improbable results.

Id. at 1231 (citations omitted).[14]

Thus, in imposing a fiduciary duty of disclosure that has no basis in the comprehensive reporting and disclosure provisions set forth in sections 101 through 105 of ERISA, the court of appeals has directly contradicted this Court's decision in *Curtiss-Wright*, a decision that the court of appeals ignored in its opinion.[15]

Second, if plan participants are permitted to pursue claims for benefits to which they are *not* entitled by relying on

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14. Courts of appeals in the Fifth, Ninth and Eleventh Circuits have similarly recognized that when an employer discloses to plan participants information regarding the terms of the plan in the summary plan description, the employer has satisfied its fiduciary duty of disclosure as the plan administrator. *See Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 680 (5th Cir. 1989) (refusing to "find a fiduciary breach in the supervisor's failure to remind [the plan participant] of the conversion option" under the terms of a plan where the participant had been provided with a summary plan description which specifically advised him of his options regarding the continuation of coverage following his resignation); *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989) (refusing to impose an additional fiduciary disclosure obligation on a plan administrator where the administrator "adequately explained the rule that it applied to [the plan participant] in its summary plan description"); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.) (holding that the district court erred when it "created an additional notification requirement by requiring [the employer] to announce again to its employees its intention to retain the right to amend its retirement plan" where that right had already been disclosed to employees in a summary plan description), *cert. denied*, 502 U.S. 938 (1991).

15. The court of appeals did, however, rely on its own decision in *Curtiss-Wright* for a proposition that was not addressed by this Court. App. 18a, 19a.

the failure of an employer to remind them of its statutory right to amend or terminate a benefit plan, the well-established standard that a written ERISA plan is not subject to modification by oral statements or by informal amendment will be eviscerated. Plan participants could simply ignore the specific disclosures that Congress decided to require of an employer and rely instead on "confusion," "misunderstanding," or "misrepresentations" regarding their benefit rights. The courts in at least seven other circuits, however, have protected the integrity of written ERISA plans with substantially more vigor than the court of appeals in this case. These courts have refused to allow plan participants to circumvent the properly disclosed terms of a plan even in those situations where, as here, the employer made informal representations regarding the "lifetime" duration of retiree medical benefits. *See, e.g., Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 493 (2d Cir. 1988) (holding that communications describing retiree medical benefits as "lifetime" in duration do not "constitute the kind of misleading behavior" that overrides the reservation of rights clause in a summary plan description); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 857 (4th Cir. 1994) ("in particular, the fact that Schedule II documents referred to retirees' benefits as 'lifetime benefits' does not nullify the company's right to modify, because the Schedule IIs are informal communications that do not govern the company's obligations under an ERISA plan"), *cert. denied,* 115 S. Ct. 1442 (1995); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (rejecting plan participant's claim for benefits based on oral misrepresentation because courts are "bound by ERISA's emphatic preference for written agreements"); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir. 1993) ("It is well-established that the written terms of a plan may not be modified or superseded by oral assurances or other extrinsic evidence"); *Vershaw v. Northwestern Nat'l Life Ins. Co.*, 979 F.2d 557, 559 (7th Cir. 1992) ("Though it is unfortunate that an insurance company's agent would lead a policyholder to believe that she was covered when she was not, the policies underlying ERISA require a preference for written over oral contract terms"); *Straub v. Western Union Tel. Co.*, 851 F.2d

1262, 1265 (10th Cir. 1988) (rejecting claim for benefits based on "negligent misrepresentation" claim since end result would be oral modification of plan); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (rejecting claim for benefits based on informal communications that were inconsistent with terms of a written plan).

By hearing this case in tandem with *Varity*, this Court will be able to clarify further the fiduciary disclosure obligations discussed in *Curtiss-Wright* without being constrained by the unique factual circumstances of *Varity*, where the employer made fraudulent misrepresentations regarding subjects not addressed in a summary plan description. It is critically important for both employers and plan participants to determine whether their respective obligations and rights will be defined and limited by a summary plan description. It is easy to imagine, for example, that a participant could claim an entitlement to reimbursement for a medical procedure clearly not covered by a plan by contending that he or she was misled by a benefits counselor about the coverage in an informal communication in breach of a fiduciary duty. Similarly situated participants could thus have very different entitlements under a plan depending on the questions asked and answers given, a result which neither Congress nor this Court in *Curtiss-Wright* would appear to countenance. The floodgates of litigation should not be opened, and the certainty of a written plan description should not be replaced with the uncertainty of "who said what to whom," by an unwarranted expansion of fiduciary conduct and obligations.

Should the Court nevertheless decide not to hear this case in tandem with *Varity*, Unisys' petition should be held pending the decision in *Varity*. If the Court rules in favor of the employer on the first question in *Varity*, thereby concluding that a plan participant or beneficiary may not sue for individual relief for a breach of fiduciary duty under section 502(a)(3) of ERISA, then the petition in this case should be granted and the case remanded to the court of appeals. The court of appeals should then direct the district court to dismiss the breach of fiduciary duty claim of the Sperry regular retir-

ees in light of *Varity*. As both the district court and the court of appeals noted, the Sperry regular retirees, like the respondents in *Varity*, are seeking individual relief on their own behalf under section 502(a)(3), and they have no alternative basis for challenging Unisys' decision to terminate its retiree medical benefit plans.[16] App. 22a, 80a.

Alternatively, if the Court holds in *Varity* that individual breach of fiduciary duty claims are cognizable under section 502(a)(3), but resolves the second question there presented in favor of the employer, the petition in this case should be granted and the case remanded to the court of appeals for reconsideration in light of *Varity*. On remand, the court of appeals would once again be obligated to direct the district court to dismiss the Sperry regular retirees' breach of fiduciary duty claims since that result would follow *a fortiori* from a ruling in favor of the employer on the second question presented in *Varity*. Given the fact that the fraudulent misrepresentations in *Varity* related to subjects that were not addressed in a summary plan description, a holding in *Varity* in favor of the employer on the second question necessarily implies that there was no breach of fiduciary duty in this case, since the information at issue here was already disclosed in the summary plan descriptions and there was no fraud or benefits avoidance scheme.

Finally, in the event that the Court resolves both questions in *Varity* in favor of the respondents and against the employer, Unisys respectfully submits that the Court should grant the present petition and set this case for full briefing and argument solely on the second question presented. This would enable the Court to clarify the scope of an employer's fiduciary duty of disclosure in light of the factual distinctions between this case and *Varity*, as described above, and to

16. The court of appeals has already concluded that the Sperry regular retirees' plan-based and estoppel claims are without merit, and the retirees have never sought relief on behalf of the plans under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2). Moreover, they would have no basis for doing so in any event since the court of appeals has already concluded that those plans were properly terminated by Unisys and are thus no longer in existence. App. 144a-151a.

resolve the conflict both among the circuits and between the court of appeals' decision and this Court's decision in *Curtiss-Wright*. Review is essential in view of the dramatic effect the court of appeals' decision will have on the administration of employee welfare benefit plans and in light of the possibility that the decision will require thousands of hearings before the district court to adjudicate the Sperry regular retirees' breach of fiduciary duty claims.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be heard in tandem with *Varity*.

Respectfully submitted,

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Dated: September 8, 1995

APPENDICES

APPENDIX A

Filed June 28, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1875

IN RE: UNISYS CORP. RETIREE
MEDICAL BENEFIT "ERISA" LITIGATION

Unisys Corporation,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. MDL 969)

Argued:

May 4, 1995

Before: MANSMANN, SCIRICA and McKEE,
Circuit Judges.

(Filed: June 28, 1995)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

We are asked to decide whether a claim for breach of fiduciary duty may be maintained under section 502(a)(3)(B) of ERISA, 29 U.S.C. § 1132(a)(3)(B), where, despite reservation clauses that the company retained the right to terminate the plans "at any time" and for "any reason," summary plan descriptions informed retired employees that the duration of their retiree medical benefits was for life, and company representatives misinformed employees that once they retired, their medical benefits would "be continued for the rest of your life." Because we hold that a breach of fiduciary claim may be maintained under these circumstances, we must also decide whether equitable relief is available under ERISA to individual plan participants. We hold that, assuming a breach of fiduciary duty can be proven, equitable relief is available to individual plan participants pursuant to 29 U.S.C. § 1132(a)(3)(B).

I.

This class action, filed on behalf of former employees of Sperry Corporation, arises out of the termination of post-retirement medical plans, sponsored by Unisys for retirees and disabled former employees of Unisys and its corporate prede-

cessors, Sperry Corporation and Burroughs Corporation. The retirees sought to recover post-retirement medical benefits under the terms of their benefit plans and under ERISA's provisions for appropriate equitable relief.

In September of 1986, Sperry Corporation and Burroughs Corporation merged to form Unisys Corporation. Prior to the merger, Sperry consisted of a number of business units or divisions. Until 1984 each Sperry division maintained its own medical benefits program, with each described in a separate summary plan description. In 1984, in an attempt to streamline the medical benefits plans and in response to rising medical costs, Sperry implemented Medflex, a corporate-wide medical benefits plan that applied to the entire Sperry Corporation.[1] Medflex was applied to future retirees only; existing retirees continued to receive coverage under the pre-Medflex plans which applied when they retired.

Following the merger in 1986, Unisys continued the Medflex plan for active employees and those who retired after its implementation but prior to April 2, 1989. Unisys also continued all of the pre-Medflex plans for those who retired prior to Medflex's implementation. In 1989, Unisys effected the consolidation of its retiree medical benefit plans when it created the Unisys Post-Retirement and Extended Disability Medical Plan to cover all employees who retired after April 1, 1989, most of whom were former Sperry and Burroughs employees.

On November 3, 1992, Unisys publicly announced that effective January 1, 1993, it was terminating all existing medical benefit plans and replacing all of the pre-existing medical plans with the new Unisys Post-Retirement and Extended Medical Disability Plan. Under the new plan, retirees would be responsible for increasing levels of contributions until January 1, 1995, when they would have to pay the full cost of their premiums. Thus, the new plan sharply contrasted with earlier

1. Medflex applied to all Sperry business units by January 1, 1984, with the exception of one sub-group of the Sperry Division, which commenced participation in Medflex on January 1, 1985.

plans, under the majority of which Unisys paid the entire premium for an individual's life and provided benefits for the individual's spouse as well.[2]

The appellees in this appeal are former employees of Sperry corporation (and their eligible dependents) who retired

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2. Unisys' decision to terminate the benefit plans under which it had provided coverage and to replace those plans with the new Unisys Post-Retirement and Extended Disability Medical Plan was challenged in nine separate actions which the Judicial Panel on Multidistrict Litigation transferred to the Eastern District of Pennsylvania and consolidated for disposition. On June 9, 1993, after determining that Unisys "acted on grounds generally applicable to the class," the district court certified the case as a class action pursuant to Fed. R. Civ. P. 23(b)(2). The class consists of approximately 21,000 former non-union employees of Sperry, Burroughs and Unisys. The court certified three distinct classes: Unisys retirees, Sperry retirees or Burroughs retirees and the claims of each class were adjudicated separately. Further, the retirees asserted two sets of claims: general claims on behalf of all retirees, and separate claims on behalf of "early" retirees who retired under various early retirement incentive programs offered by the company throughout the 1980s.

This appeal concerns some of the claims of the Sperry regular retirees, and the claims of a sub-group of Sperry early retirees. The appeals docketed at Nos. 94-1800, 94-1801, 94-1912 and 94-2216 [*sic*] concern the claims of the Unisys and Burroughs retirees, as well as the remaining claims of the Sperry retirees. In appeal No. 94-1800 the Sperry regular retirees and certain early retirees have appealed from an adverse judgment rendered after trial on their claims for breach of contract and estoppel. The claims of the Burroughs early retirees and many of the claims of the Sperry early retirees were settled pursuant to a partial settlement agreement between Unisys and these retirees. In appeal No. 94-1801 the Unisys early retirees have appealed from an adverse judgment rendered after trial on their claims for breach of contract, breach of fiduciary duty and estoppel. In appeal No. 94-1912 the Burroughs and Unisys regular retirees have appealed from the district court's grant of summary judgment in favor of Unisys on their breach of contract and estoppel claims. In appeal No. 94-2166, a sub-group of Sperry retirees attempted to challenge the partial settlement between Unisys and the Sperry and Burroughs early retirees which did not include them. On October 3, 1994, we granted the parties' joint motion to consolidate appeals Nos. 94-1800, 94-1801, 94-1875 and 94-1912 for purposes of filing a single joint appendix and for disposition. All of these appeals have now been resolved, either by our decisions in published opinions, *see* Nos. 94-1800 and 94-1875, or by memorandum opinions rendered in Nos. 94-1801, 94-1912 and 94-2216 [*sic*].

between 1969 and April 1, 1989, from Sperry Corporation or Unisys, Sperry's successor. Following Unisys' termination of their post-retirement medical benefit plans in late 1992, the retirees sought relief based on three theories: breach of contract, equitable estoppel, and breach of fiduciary duty. The Sperry retirees argued that Unisys' termination of their respective medical plans violated ERISA. They argued first that Unisys had denied them "vested" benefits in violation of 29 U.S.C. § 1132(a)(1)(B) because the summary plan descriptions ("SPDs") explaining their medical benefits contained the term "lifetime" benefits. Regarding their contract claims, the retirees relied on the explicit lifetime language in the plans, *e.g.*, "when you retire, your medical benefit will be continued for the rest of your life," and on statements to the same effect made by the company both orally and in writing.

The Medflex SPD is illustrative. A Sperry employee who retired during the period January 1, 1984, through April 1, 1989, received medical benefits under this plan. The SPD for medical benefits is set forth in a booklet titled, "Your Company and You." Included in this plan was the following description of retiree medical benefit coverage:

> If you're eligible, Medical Plan benefits continue without cost after you terminate active employment. Benefits also may continue on a contributory basis for your eligible dependents who are covered when your employment terminated. . . . Coverage *continues for you for life* and for your dependents while they remain eligible provided you don't stop the contributions for their coverage. After your death, your eligible dependents may continue coverage by making the required contributions. Their coverage continues until your spouse dies or remarries.

(A 2227) (emphasis added). Second, the retirees argued that even if Unisys had the legal right to terminate the plans (pursuant to the reservation of rights clause located in other sections of the plans), Unisys had breached its fiduciary duty by affirmatively misleading plan participants regarding the dura-

tion of their retiree medical benefits. Lastly, the retirees asserted claims based on equitable estoppel.[3]

Unisys' response to these arguments was that it had reserved the right to terminate the retirees' medical plans due to a "reservation of rights clause" or "ROR" located in another section of the plan. Typical of these clauses is the one set forth in the SPD describing the Medflex plan. The Medflex SPD booklet, "Your Company and You," was distributed to all employees and contained the following reservation of rights clause:

> Plan Continuation
> The Company expects to continue the Plans, but *reserves the right to change or end them at any time.* The Company's decision to change or end the Plan may be due to changes in federal or state laws governing welfare or retirement benefits, the requirements of the IRS or ERISA, the provisions of a contract or policy involving an insurance company *or any other reason* . . . .

(A 2750) (emphasis added).

In addition to the provisions set forth in the SPDs, information about retiree medical benefits was also conveyed to the Sperry retirees through various informal oral and written communications. As in the SPDs, the duration of medical benefits was described as being "for life" or for the "lifetime" of the retiree and his or her spouse. Sperry did not include in these informal communications a reference to the reservation of rights clause.

Notwithstanding these communications, Unisys denied having created vested medical benefits through its use of the word "lifetime," and early in this litigation filed a motion for summary judgment seeking dismissal of all of the regular retirees' claims based on the unambiguous reservation of rights clauses in the plans.[4] On October 13, 1993, the district court

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3. The Sperry retirees' contract and estoppel claims are not implicated in this appeal. They are the subject of an appeal docketed at 94-1800.

4. Although the district court granted Unisys' motion on the retirees' breach of fiduciary duty and estoppel claims, it denied summary judgment

granted summary judgment in favor of Unisys on the Sperry retirees' claim that Unisys had breached its fiduciary duties. *In re Unisys*, 837 F. Supp. at 670, 679-80 (E.D. Pa. 1993).

At the trial conducted on their contract claim, the Sperry retirees moved for reconsideration of their breach of fiduciary duty claim in light of our decision, rendered during trial, in *Bixler v. Central Pa. Teamsters Health and Welfare Fund*, in which we held that a direct action for breach of fiduciary duty is available under section 1132(a)(3)(B).[5] *Bixler*, 12 F.3d 1292 (3d Cir. 1994). The retirees argued that "even if the reservation of rights clause in the SPDs were intended to apply to existing retirees [as opposed to active employees], Sperry and later Unisys, had a fiduciary duty to make this point clear." (A 2284). The district court observed:

> This is not a case where one or two low level benefits counselors told a few retirees that their benefits would continue for life. The message that medical benefits would last for life was confirmed repeatedly and systematically throughout the Sperry organization, by all levels of management, in writing and verbally. In fact, as the Findings make clear, several high level corporate executives, as well as personnel managers, testified that they believed the [reservation of rights clause] was inapplicable to retirees and counseled individuals accordingly.

(A 2284). Although the district court also observed that the summary plan description is the controlling document upon

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on the retirees' contract claim. The district court found that the internal inconsistency between the lifetime promises and the RORs made the Sperry plans ambiguous and that under *Mellon Bank N.A. v. Aetna Business Credit*, 619 F.2d 1001 (3d Cir. 1980), a trial on the extrinsic evidence was necessary to resolve the ambiguity. *In re Unisys*, 837 F. Supp. at 679. After trial, the district court reversed its position on both the contract and breach of fiduciary duty claims, entering judgment against the Sperry retirees on the contract claim and reversing its earlier dismissal of the breach of fiduciary duty claim.

5. The district court opined that the Sperry retirees had presumably brought their breach of fiduciary duty claim pursuant to the "other equitable relief" clause in 29 U.S.C. § 1132(a)(3)(B).

which plan participants must rely and that informal communications cannot alter the terms of a written plan, the court discerned "a strong current in the Third Circuit that recognizes that an ERISA fiduciary may not 'affirmatively mislead' plan participants." *Id.* (citing *Bixler*, 12 F.3d 1292, and *Fischer v. Phila. Elec. Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993)).

Unisys argued that *Bixler, supra*, and *Fischer, supra*, were inapposite in a situation where the summary plan description itself informs the participants of the answer to their inquiry regarding benefits. After reviewing *Fischer* and *Bixler*, the district court concluded that the evidence supported a breach of fiduciary duty claim. The court stated, "First, it is clear that the highest levels of corporate management at Sperry, and later Unisys, recognized that employees might be under the mistaken belief that 'lifetime' meant forever."[6] The evidence suggested to the court that "by the mid-1980's, defendant understood the potential for confusion concerning the meaning of 'lifetime benefits.' " The court further observed that

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6. The court found that this was evidenced in part by a confidential letter in which John Loughlin, who was then staff Vice President, Employees Benefits for Sperry, wrote:

> *It is important to determine the implied promise that has been made regarding post-retirement medical benefits.* Recent court cases have impaired the employer's ability to reduce these benefits after retirement. The Company should consider how the promise can be limited so as to control the impact on Company costs of future medical inflation and Federal cost-shifting.

(A 2288). The second letter upon which the district court relied was a confidential 1988 memorandum from J.A. Blain, then Vice-President of Human Resources for Unisys, to W.M. Blumenthal, then CEO of Unisys, which cautioned:

> Although we have not suggested to either active employees or current retirees that we may consider changes in Post Retirement Medical for those already retired, we feel our analysis would be incomplete if we did not address possible changes to the Post-Retirement Medical Plans of our 16,000 current retirees. . . . *Many retirees will undoubtedly suggest that when they retired, they felt that their medical program would continue without changes.* . . .

(A 2288).

the "Defendant then exacerbated this potential [for confusion] with numerous informal communications that discussed lifetime benefits without explicit reference to the [reservation of rights clause]."[7] (A 2289).

The court found that the retirees had presented credible testimony that some individuals specifically asked if their benefits would continue for life and were told they would, without any mention of the reservation of rights clause. (A 2290). When faced with a specific inquiry as to the explanation of benefits, the district court held that "an employer cannot give vague or incorrect answers, especially on a repeated and pervasive basis." *Id.* Because the breach of fiduciary duty claim was not directly before the court at trial, it did not hold that a breach in fact occurred. In granting reconsideration of this issue though, the district court concluded that "based on the evidence and the law in this circuit, it seems possible that at least some plaintiffs will be able to sustain a breach of fiduciary duty claim."[8] (A 2291). Given the complexity of the legal question involved and its uncertainty of the contours of *Bixler*, the district court certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On July 22, 1994, Unisys filed a petition for permission to appeal pursuant to 28

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7. The district court found that "Unisys could have easily put an explicit [reservation of rights clause] in each informal communication given to employees rather than only use the lifetime language; also, when employees made specific inquiries to benefit counselors during exit interviews and at group retirement sessions, the company could have instructed the counselors to tell prospective employees that although the word 'lifetime' is used, the company always reserves its right to terminate the plans." (A 2289-90).

8. Because the court believed that some plaintiffs had stronger cases than others based on their specific inquiries and the information given to them personally, the court found that subclasses, and possibly even individual hearings, would be necessary to adjudicate the breach of fiduciary duty claims. The court did not express an opinion as to what damages would be recoverable and recognized that the parties would brief the issue at a later time.

U.S.C. § 1292(b). We granted Unisys' petition on August 8, 1994.[9]

II.

Section 404(a)(1) of ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ." 29 U.S.C. § 1104(a)(1).[10] Recognizing this statutory obligation, we have held that in the exercise of these duties, the fudiciary "may not

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9. The district court certified for immediate appeal and we accepted the following controlling questions of law:

> (a) May a breach of fiduciary duty claim be maintained under ERISA where:
>
> (1) the applicable summary plan descriptions ("SPDs") informed class members that the duration of retiree medical benefits was for life, but reservation clauses in the SPDs stated that the company reserved the right to terminate the plans at any time and for any reason; and
>
> (2) company representatives misinformed class members that once they retired, their medical benefits would continue for life, as detailed in the Court's Opinion of June 23, 1994?
>
> (b) Assuming that a breach of fiduciary duty claim may be maintained under the above circumstances, is equitable relief available to individual participants under ERISA?

10. ERISA broadly defines a fiduciary as any person who "exercises any discretionary authority or discretionary control respecting management of such plan . . . or has any discretionary authority in the responsibility in the administration of the plan." 29 U.S.C. § 1002(21)(A).

There is no question that both Sperry and later Unisys were acting as plan administrators, and thus were acting in a fiduciary capacity, when they made the material misrepresentations that support the claim for breach of fiduciary duty in this case. Our decisions firmly establish that when a plan administrator explains plan benefits to its employees, it acts in a fiduciary capacity. *See, e.g., Genter v. ACME Scale and Supply Co.*, 776 F.2d 1180 (3d Cir. 1985) (holding that ACME Scale and Supply met the ERISA definition of fiduciary as an employer-administrator of the plan at issue); *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 133 (3d Cir. 1993) (finding employer to have fiduciary status solely on the basis of its role as plan administrator under ERISA); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158 (3d Cir. 1990) (holding that when employers serve as plan administrators, they assume the role of fiduciary under ERISA). When a corporate plan administrator speaks about benefits to its employees, the administrator acts in a fiduciary capacity even if he speaks about a non-fiduciary decision such as the business decision to terminate a welfare benefit plan. See *Hozier, supra.*

materially mislead those to whom the duties of loyalty and prudence . . . are owed." *Fischer,* 994 F.2d at 135; *Bixler*, 12 F.3d at 1300; *Curcio v. John Hancock Mutual Life Insurance Co.,* 33 F.3d 226, 238 (3d Cir. 1994).

In *Fischer*, we held that a plan administrator may not make affirmative material misrepresentations to plan participants about changes to employee benefit plans. *Fischer* involved employees who retired shortly before their employer offered an early retirement plan or "retirement sweetener." Although the company had announced that it might offer such a plan, when employees inquired about its availability, they were told by benefits counselors that "no plan was being considered." *Fischer*, 994 F.2d at 132. The benefit counselors were technically telling the truth, since they had not been informed by the corporation that a retirement sweetener was under serious consideration. Nonetheless, we held that a material issue of fact existed as to whether the employer had breached its fiduciary duty to its employees by responding in a misleading fashion to their questions about the sweetener. *Id.* at 135. We held that, "Put simply, when a plan administrator speaks, it must speak truthfully." *Id.*

We affirmed this principle in *Bixler* in holding that a plan administrator has an affirmative duty to "speak when it knows that silence might be harmful." There the widow of a plan participant contacted her husband's employer while the COBRA election period was still open, to ask whether there was a death benefit to which she was entitled. We held that:

> If [the employer's agent] knew that Mr. Bixler's death left Mrs. Bixler with substantial unpaid medical expenses and that she could receive reimbursement for those expenses under the Drivers' plan by signing and returning the COBRA notice that [he] had sent to her husband, we believe the failure to advise her of the available benefits might be found to be a breach of fiduciary duty despite the fact that her inquiry was limited to the availability of a death benefit.

12 F.3d at 1302. Although we did not decide whether a breach of fiduciary duty in fact occurred, we observed that the

fiduciary's duty to inform "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Id.* at 1300. Significantly, we held that the employer's failure to advise Mrs. Bixler regarding her COBRA rights could constitute a breach of its fiduciary duty even though the employer had previously provided the information in a written COBRA notice[11] and even though the employer's omission in that case concerned facts about which Mrs. Bixler had not specifically inquired.

Similarly in *Curcio v. John Hancock Mutual Life Insurance Co.*, 33 F.3d 226 (3d Cir. 1994), we held that an employer's misrepresentations regarding the existence of supplemental accidental death and dismemberment insurance, in representations made to employees during solicitations for enrollment in a new life insurance program which provided only for supplemental life insurance, established a breach of fiduciary claim. *See also Smith v. Hartford Ins. Group,* 6 F.3d 131 (3d Cir. 1993) (employer's erroneous representations that Smith would receive some level of coverage under new plan gives rise to a breach of fiduciary duty claim under ERISA); *Taylor v. Peoples Natural Gas Co.,* 49 F.3d 982 (3d Cir. 1995) (a plan administrator may be liable for the material misrepresentations made by individuals who have been selected as non-fiduciary agents by the plan administrator to assist it in its fiduciary obligation to administer a plan).

Unisys argues that the district court's decision in this case is based on an unwarranted extension of our holding in *Bixler.* Unisys points to the fact that Sperry and later Unisys unambiguously advised employees in summary plan descriptions that the company had reserved the right to terminate its retiree medical benefit plans. Thus, Unisys contends that *Bixler* did not address the principal issue in this appeal which Unisys frames as "whether an employer has a fiduciary duty to

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11. Mrs. Bixler received the requisite notice that she had a right to elect "COBRA" contribution coverage at her own expense, but she did not do so, believing that the COBRA notice did not apply to her since her husband was already in the hospital and she mistakenly believed that this precluded him from being eligible for coverage. *Bixler*, 12 F.3d at 1302.

remind its employees of its right to modify or terminate a benefit plan when it already disclosed that information in an SPD." Appellants' brief at p. 19. We reject Unisys' characterization of the fiduciary duty involved as "one to remind" and of the cases upon which Unisys relies.

Under ERISA, fiduciaries have certain duties which include "the disclosure of specified information." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142-45 (1985). A fiduciary's statutory disclosure obligations are set forth in ERISA, 29 U.S.C. §§ 1102, 1021 and 1022. Under 29 U.S.C. § 1102(a)(1), "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument . . . ." Under section 1022(a), "[a] summary plan description of employee benefit plan is to be furnished to plan participants" and the plan description "shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1). Further, ERISA requires that the summary plan description "explain the circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," 29 U.S.C. § 1022(b), "in a manner that is calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a)(1).[12] A summary plan description "must not

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12. **§ 1021. Duty of Disclosure and Reporting**

(a) Summary plan description and information to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan —

(1) a summary plan description described in section 1022(a)(1) of this title; and

* * * *

§ 1022. Plan Description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and

have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. § 2520-102-2(b) (1987).

Unisys argues that we should reject the notion that *Bixler* can be interpreted as imposing a broad duty to inform "upon a fiduciary that has satisfied its statutory disclosure obligations." Unisys is correct that we have held that a fiduciary may satisfy its statutory disclosure obligations regarding the terms of a plan by distributing a summary plan description that complies with ERISA. *See, e.g., Stahl v. Tony's Bldg. Materials Inc.*, 975 F.2d 1404 (9th Cir. 1989) (holding employee trust fund did not breach its fiduciary duty to a union member by failing to warn him individually that his pension benefits could be drastically reduced where the rule that applied was adequately explained in the summary plan description); *Allen*

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comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

* * * *

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be following in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

v. Atlantic Richfield Retirement Plan, 480 F. Supp. 848 (E.D. Pa. 1979), *aff'd*, 633 F.2d 209 (3d Cir. 1980) ("Congress did not intend to impose a duty to provide the kind of individualized attention urged by plaintiff here, but rather envisioned that a fiduciary could discharge its obligations through the use of an explanatory booklet"); *Schlomchik v. Retirement Plan of Amalgamated Ins. Fund*, 502 F. Supp. 240 (E.D. Pa. 1980), *aff'd*, 671 F.2d 496 (3d Cir. 1981) ("no duty on the part of defendants to provide this particular employee with individualized attention . . . ."); *Schiffer v. Equitable Assurance Sec. of the U.S.*, 838 F.2d 78 (3d Cir. 1988) (rejecting argument that a fiduciary owed an obligation to a beneficiary to explain the terms of a written plan). These cases, however, are inapplicable here. In each of them, breach of fiduciary duty claims were rejected because the plan documents clearly explained the benefits in question; none involved allegations that a breach of fiduciary duty had occurred because a plan administrator had affirmatively and materially misrepresented the terms of a plan. Furthermore, satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.

Contrary to Unisys' claim, this is not a case involving an employer's "duty to remind". Instead, this case is more accurately characterized as a dispute over an employer's duty, as an ERISA fiduciary, not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures. In the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision. *Fischer v. Philadelphia Elec. Co.*, 994 F.2d at 135. Here the district court found that Unisys affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life — even though as the district court concluded in

rejecting the retirees' contract claim, the plans clearly permitted the company to terminate benefits.[13] We have no doubt that the conduct Unisys engaged in, based on the findings of the district court, would constitute a breach of fiduciary duty in its most basic form. Our decisions in *Bixler, Fischer, Curcio* and *Smith* firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.

Imposing upon an employer a fiduciary duty in this case does not threaten or contradict our well-established policy disfavoring informal plan amendments.[14] We recently recognized in *Curcio, supra,* that our equitable theories of relief

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13. We have previously held that the Sperry retirees did not have a claim for relief based on breach of contract due to the unambiguous language of the reservation of rights clauses. *See In re Unisys,* No. 94-1800, slip opinion (3d Cir. June 28, 1995). This decision does not foreclose the retirees' claim for relief based on a breach of fiduciary duty. In *Curcio, supra,* we upheld Mrs. Curcio's claim for breach of fiduciary duty, even though we had rejected her contract claim arising out of the same set of circumstances. *See also Howe v. Varity Corp.,* 36 F.3d 746, 753 (8th Cir. 1994), *cert. granted,* 115 S. Ct. 1792 (April 24, 1995) (*Howe I,* in which plaintiffs' contract-type claims that benefits had vested were rejected, does not bar plaintiffs from urging in *Howe II* that they were entitled to relief on the basis of breach of fiduciary duty or estoppel).

14. Unisys argues that we recently recognized the "troubling implications" of a misrepresentation claim based upon alleged oral misrepresentations to plan participants where accurate information was available in a summary plan description. (Unisys brief at pp. 31-32). Unisys directs our attention to a footnote in our decision in *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan,* 24 F.3d 1491, 1501 n.6 (3d Cir. 1994) in which we stated:

> Thus, we do not reach the question whether Haberern's misrepresentation argument could be upheld under Section 502(a)(3). [citation omitted]. *We do note, however, that Haberern's misrepresentation argument has troubling implications because the summary plan description pages given to her made it clear that the retirement benefit was based on compensation and the compensation did not include bonuses.* [citations omitted]. Of course, the summary plan description mirrored the plan itself. Thus, Haberern effectively is relying on parol evidence to contradict clearly defined terms of a plan revealed to her in writing. Accordingly,

under ERISA (breach of fiduciary duty and estoppel) are "not to be construed as conflicting with our precedent precluding oral or informal amendments to ERISA benefit plans." 33 F.3d at 236 n.17.

The retirees here do not argue that Unisys' misrepresentations modified their retiree medical benefit plans. Rather, for purposes of their breach of fiduciary claim, they *assume* the plans did not contractually vest benefits, and claim instead that the company breached its fiduciary duty by leading employees to believe that the plans did. This claim is distinct from a claim for benefits under the terms of the plan because it requires different proof (proof of fiduciary status, misrepresentations, company knowledge of the confusion and resulting harm to the employees) than would be required for a contract claim that the plans had been modified.

In recognizing the retirees' breach of fiduciary claim here, we do not intend to "create a precedent for any beneficiary to make claims beyond those provided in a plan." *See Haberern*, 24 F.3d 1492, 1501 n.6 (3d Cir. 1994). However, the facts and circumstances in this case clearly warrant our recognition of a claim of a fiduciary breach. Here the district court found that virtually the entire company management had consistently misrepresented the plan, not just on one occasion or to one employee, but over a period of many years and both orally (in group meetings) and in writing (in newsletters) as well. Under

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if we adopt her approach we will create a precedent for any beneficiary to make claims for benefits beyond those provided in a plan. It would be difficult to reconcile that result with our cases holding that oral or informal amendments to ERISA benefit plans are precluded. *See Confer v. Custom Eng'g Co.*, 952 F.2d 41, 43 (3d Cir. 1991); *Frank v. Colt Indus. Inc.*, 910 F.2d 90, 98 (3d Cir. 1990); *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1040 (3d Cir. 1994), *rev'd and remanded on other grounds*, ___ U.S. ___, 115 S. Ct. 1223 (1995) ("Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan.").

However, as the district court in *Haberern* observed, Haberern's claim (with respect to her bonus) was brought pursuant to section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) and *not* under section 1132(a)(3)(B), the provision of ERISA pursuant to which the retirees' claims are brought here.

these circumstances, we do not find a conflict with our policy against informal plan modification.[15]

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15. Finally, Unisys attempts to distinguish *Bixler* from this case "because in *Bixler*, the information which allegedly was not supplied to the participant involved *current* facts which if brought to the attention of the participant, would have avoided a *current* loss of benefits under the plan." Unisys thus urges us to limit *Bixler's* application to a breach of fiduciary duty based upon a failure to disclose present circumstances that may affect an employee's *present* right to specific benefits under the terms of a plan. Unisys maintains that there is no evidence that at the time of the oral and written communications regarding retiree medical benefit coverage, anyone within the company knew that Unisys would be terminating its retiree medical benefit plans in November, 1992. (*See* Appellants' brief at pp. 35-36: "at the time the lifetime benefits were provided to retirees the company was not anticipating discontinuing them.")

We have previously held that ERISA does not "impose a duty of clairvoyance" under which employers would be required to advise participants and beneficiaries of the risk of plan changes not even being contemplated. *See Curtiss-Wright,* 18 F.2d at 1042, n. 7. *See also Fischer,* 994 F.2d at 135 (an ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan). Our holding today should not be interpreted as creating a fiduciary obligation to predict and disclose future possibilities or potentialities to plan participants.

We accept Unisys' contention that at the time lifetime benefits were promised, no one at Sperry ever intended or anticipated that there would one day be the need to reduce or eliminate retiree medical benefits. Nonetheless, an ERISA fiduciary does have an obligation to "answer participants' questions forthrightly," *Fischer*, 994 F.2d at 135, and "a duty to communicate complete and accurate information about a beneficiary's status." *Eddy v. Colonial Life Insurance*, 919 F.2d 746, 751 (D.C. Cir. 1990). This was the obligation that was breached in this case. The district court found that the retirees had presented credible testimony that some individuals specifically asked if their benefits would continue for life and were told they would, without any mention of the reservation of rights clauses. (A 2290 n.69). Employees were told, "Once you retire and take your first pension check from the company . . . that's it." (A 2534). Thus, while Unisys may not have anticipated ending the plans, it knew that it had the ability to do so and it knew that its employees were receiving answers to their specific inquiries that were vague, misleading and contradictory.

Unisys' situation was not completely unanticipated. Indeed, the company had the foresight to draft and incorporate reservation of rights clauses into its retiree medical plans, which expressly gave the company the right to terminate the plans if they became onerous. Unisys was aware of the retirees' confusion regarding the applicability of these clauses to their benefits

We turn now to the evidence adduced at trial on the breach of contract claim to see if sufficient evidence would support the other elements of the breach of fiduciary duty claim, specifically, Unisys' knowledge that its employees were mislead by Unisys' misrepresentations and Unisys' knowledge that its misrepresentations were material to the beneficiaries' circumstance because the misrepresentations influenced their decisions to retire.

III.

In detailed and well-supported findings, the district court found that Unisys had knowledge that its employees believed the assurances of lifetime benefits they had been given and were making retirement decisions based on their understanding that when they retired, the benefits that they had at the time they retired would continue for life. Uncontroverted evidence established that Unisys' executives were aware that the lifetime medical benefit was an important consideration for employees who were considering when to retire. This evidence established that the company knew that employees accelerated their retirement plans because of the belief that by retiring at a certain point in time, they would "lock in" the lifetime coverage that they had under the current plan.[16] Further, the district court found that once Unisys was aware of the fact that retirees were electing to retire based on this understanding, Unisys failed to do anything to correct the misinformation, and instead reinforced the misunderstanding by continuing to repeat the same assurances that upon retirement a retiree's benefits would continue for life.

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and the retirees' mistaken belief that their benefits could not be terminated once an employee retired. Under these circumstances, we find a duty to convey complete and accurate information arose.

16. The district court quoted testimony from Sperry's former Senior Vice President for Personnel, Frank Sweeten, who acknowledged that the lifetime promises made by Unisys to retiring employees was an influence in retirement decisions:

> We said that this is yours for life. You have got it for life. And people made decisions on that. They decided whether to go [*i.e.*, retire] or not go on the basis that they were told this is for life.

(A 2230 n.19).

The district court found that the company, both actively and affirmatively, systematically misinformed its employees about the duration of their benefits by stating over and over again, without qualification, that their benefits would continue for life:

> There is no question that the defendant routinely spoke of the medical benefits as continuing "for life". This message was conveyed time and time again throughout informal communications that were sent out to retirees, and by oral statements that were made to these individuals both at private exit interviews and in group retirement sessions.

(A 2281-82). In addition to these communications in individual correspondence and company newsletters, the district court also cited examples of evidence that Unisys consistently responded to specific inquiries about whether a retiree's benefits could change by telling employees that they could not. (A 2290).

Given these findings, we hold that the district court did not err as a matter of law in concluding that the duty to convey complete and accurate information that was material to its employees' circumstance arose from these facts since the trustees had to know that their silence might cause harm. The district court's findings that the company actively misinformed its employees by affirmatively representing to them that their medical benefits were guaranteed once they retired, when in fact the company knew this was not true and that employees were making important retirement decisions relying upon this information, clearly support a claim for breach of fiduciary duty under ERISA.

We turn now to the remaining issue in this appeal, whether relief is available to individual plan participants under ERISA.

IV.

In *Bixler v. Central Pa. Teamsters Health-Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), we held that where a fiduciary breach causes harm to a beneficiary, that beneficiary has a claim for equitable relief pursuant to section 502(a)(3) of ERISA, which authorizes suits by participants for "appropriate equitable relief" to redress violations of ERISA.[17] Relying on our decision in *Bixler*, the district court concluded that equitable relief was available to individual plan participants for breach of fiduciary duty under section 502(a)(3)(B).

In *Bixler*, we considered both the source and the scope of an ERISA fiduciary's duty to one of its beneficiaries and held that a direct action for breach of fiduciary duty exists in the "other appropriate equitable relief" clause of section 502(a)(3)(B) of ERISA, 29 U.S.C. § 1132(a)(3)(B). Recognizing that "undoubtedly there will be instances in which a fiduciary's actions harm an individual beneficiary, but do not harm the plan," we adopted the approach of Justice Brennan's concurrence in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) to hold that "section 502(a)(3) authorizes the award of 'appropriate equitable relief' directly to a participant or beneficiary to 'redress' *any* act or practice which violates *any* provision of this title including a breach of the statu-

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17. Section 502 of ERISA provides:

> (a) Persons empowered to bring a civil action
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> A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . .

torily created fiduciary duty of an administrator." *Bixler*, 12 F.3d at 1298 (citing *Massachusetts Mutual*, 473 U.S. at 153).[18] We held that the principles of section 404(a), which serve as the touchstone for understanding the scope and object of an ERISA fiduciary's duties, are given effect by section 502(a)(3) which, in the language of the statute, authorizes the award of "appropriate equitable relief" *directly* to a participant or beneficiary to redress any act or practice which violates the provision of ERISA. We observed, of course, that this relief is independent of that established in section 409, authorizing recovery for breach of fiduciary duty on behalf of the plan.

Unisys suggests that our conclusion in *Bixler* is called into question by the Supreme Court's decision in *Mertens v. Hewitt*

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18. In *Massachusetts Mutual*, the Supreme Court addressed the question whether an ERISA fiduciary could be held personally liable to a participant or beneficiary for extra contractual damages caused by the improper or untimely processing of benefits claims. The plaintiff had sued only under ERISA's fiduciary duty section, section 409(a), and its civil enforcement section, section 502(a)(2); thus the court's holding was similarly limited. After examining the statutory language of these provisions, Justice Stevens, speaking for the majority, concluded: "The entire text of section 409 persuades us that Congress did not intend *that section* to authorize any relief [for breach of fiduciary duty] except for the plan itself." *Massachusetts Mutual*, 473 U.S. at 144.

Justice Brennan, joined by Justices White, Marshall and Blackmun, wrote separately to emphasize the limited reach of the majority opinion and to outline the proper approach for courts to take in construing other ERISA provisions. In full agreement with the majority that section 409 did not authorize recovery to an individual, Justice Brennan explained that individual recovery for breach of fiduciary duty is available elsewhere in the statute, in the "other appropriate equitable relief" clause of section 502(a)(3), reasoning that allowing an injured beneficiary recourse through the courts is essential to fulfilling the purpose of ERISA. Explaining that Congress intended this result, Justice Brennan found the fundamental purpose of the statute was the "enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries." 473 U.S. at 158. *See also id.* at 152-53, *citing* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 5030, 5106 (emphasizing that section 502 permits beneficiaries to bring a "civil action to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and *for relief from breach of fiduciary responsibility*") (emphasis added).

Assoc., __ U.S. __, 113 S. Ct. 2063 (1993), in which the Supreme Court held that money damages are not available under section 502(a)(3), which, by its very terms, authorizes only equitable relief. Although Unisys acknowledges that the Supreme Court in *Mertens* never addressed the question of whether, in the event of a breach of fiduciary duty, a plan participant could seek equitable relief on his own behalf (rather than on behalf of a plan), Unisys maintains that the Supreme Court in *Mertens* expressed an unwillingness to infer causes of action in the ERISA context. *See id.* at 2067.[19]

We do not read *Mertens* as precluding the retirees' claim for equitable relief. In a post-*Mertens* decision, the Court of Appeals for the Seventh Circuit reached the same conclusion and reversed the district court's holding that individual relief was not available under section 502(a)(3), holding instead, based on *Mertens,* that section 502(a)(3) authorized such relief. *Anweiler v. Amer. Elec. Power Serv. Corp.*, 3 F.3d 986, 993 (7th Cir. 1994).

> In *Mertens*, the Court held that the "appropriate equitable relief" in section [502(a)(3)] included only typical remedies available in equity and not "legal remedies" like compensatory damages or monetary relief. The court limited its holding to the "narrow battleground" chosen by the parties and decided the issue of "what forms of relief are available" under section 1132(a)(3), not to whom the relief can go or whether a remedial wrong had even been alleged. Nevertheless, *Mertens* clearly indicates the importance and availability of equitable relief. Moreover, the Secretary of Labor in an *amicus curiae*

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19. Unisys observes that we did not mention *Mertens* in our opinion in *Bixler*, and that two other courts since *Mertens* have held that only the plan, and not individual plan participants or beneficiaries, are entitled to relief for a breach of a fiduciary duty based on their conclusion that the sole and exclusive bases for such relief are sections 409 and 502(a)(2) of ERISA, 29 U.S.C. §§ 1109 and 1132(a)(2). *See Richards v. General Motors Corp.*, 850 F. Supp. 1325 (E.D. Mich. 1994), and *Kaiser Permanente Employees Pension Plan v. Bertozzi*, 849 F. Supp. 692, 700 (N.D. Cal. 1994) (concluding that recovery under section 502(a)(3) is limited to "relief that inures to the benefit of the plan as a whole").

> brief argues [that] *Mertens* dictates the availability of relief to an individual under section 1132(a)(3) for a fiduciary's breach of duty. Therefore, in light of *Mertens* and in deference to the Secretary's interpretation of the law which he is authorized to enforce, we hold that an individual may seek equitable relief from a breach of fiduciary duty under Section 1132(a)(3).

Id. (citations omitted). The Court of Appeals for the Eighth Circuit reached the same result in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 1792 (April 24, 1995).[20] Thus, our decision in *Bixler* is consistent with the decisions of the Courts of Appeal for the Seventh and Eighth Circuits.[21] Accordingly, we reaffirm our conclusion in *Bixler* that equitable relief running to an individual falls within the scope both of section 1132(a)(3)'s language and of ERISA's broad remedial purpose. *See* 29 U.S.C. § 1001(b).

A question left unanswered by *Bixler* is the form of equitable relief available under section 502(a)(3). Both the district court and the Sperry retirees agree that the retirees are not entitled to money damages for a breach of fiduciary duty. Instead, the retirees seek an injunction ordering specific performance of the assurances Unisys made, restitutionary reim-

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20. Interestingly, the Court of Appeals in *Howe* relied on *Mertens* to vacate the district court's award of punitive and compensatory damages, but upheld its equitable remedies in the form of monetary restitution for back benefits and an injunction restoring future benefits under the plaintiffs' former medical plan. With respect to *Mertens*, the court of appeals opined:

> *Mertens* simply holds that only "equitable relief" is available under section 502(a)(3), 29 U.S.C. § 1132(a)(3), and that this phrase does not include the collection of damages from persons who are not fiduciaries but act in concert with those who are fiduciaries. Nothing in *Mertens* precludes an award of traditional equitable relief, including an injunction, restitution, and the like. As plaintiffs now concede ... after *Mertens*, compensatory damages are not recoverable under section 1132(a)(3). But the case by no means bars equitable relief for individual participants who have suffered a breach of trust.

21. The Court of Appeals for the Ninth Circuit, in a pre-*Mertens* decision, held to the contrary. *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (beneficiary was not entitled to recover extra contractual damages for emotional distress caused by arbitrary and capricious acts of plan trustee).

bursement for back benefits, and restoration of the *status quo ante* for the Sperry early retirees by rescinding their retirement agreements. These are remedies which are restitutionary in nature and thus equitable. *See Curcio,* 33 F.2d at 238-39 ("[W]e hold that Mrs. Curcio's alternate argument [that Capital Health breached its fiduciary duty] provides additional support for our conclusion that Capital Health is liable to Mrs. Curcio for the $150,000 in supplemental AD&D", representing full enforcement of the promise that had been made); *Howe v. Varity Corp.,* 36 F.3d at 756 (award of monies plaintiffs would have received if they had remained members of the M-F plan could not properly be characterized as damages; rather, the payments were restitution). It will be for the district court to determine which of these remedies are appropriate under the circumstances of these individual claims.

V.

For the foregoing reasons, the order of the district court dated June 23, 1994, reinstating the retirees' claims for breach of fiduciary duty which was certified for appeal pursuant to 28 U.S.C. § 1292(b) by order entered July 12, 1994, will be affirmed. This cause is remanded to the district court for further proceedings.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1875

IN RE: UNISYS CORP. RETIREE
MEDICAL BENEFIT "ERISA" LITIGATION

Unisys Corporation,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. MDL 969)

Present: Mansmann, Scirica and McKee, *Circuit Judges*

JUDGMENT

The cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 4, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on June 24, 1994 and certified for appeal pursuant to 28 U.S.C. § 1292(b) by order entered July 12, 1994, be, and the same is hereby affirmed and the cause is remanded to the district court for further proceedings. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. DOUGLAS SISK
Clerk

Dated: June 28, 1995

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS CORPORATION RETIREE :
: MDL. No. 969
MEDICAL BENEFITS ERISA LITIGATION:

OPINION

CAHN, C.J. June 23, 1994

Plaintiffs allege that Unisys Corporation ("Unisys") violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*,[1] when it unilaterally modified their retiree medical benefits plans. The crux of this case centers around whether or not the plaintiffs are entitled to vested medical benefits, or whether the defendant had the right to terminate the respective plans. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

I. BACKGROUND & PROCEDURAL HISTORY

In September of 1986, Sperry Corporation ("Sperry") and Burroughs Corporation ("Burroughs") merged to form Unisys. Prior to the merger, retirees[2] of Sperry and Burroughs received medical benefits under a host of plans. The abundance of plans was primarily a result of Sperry's corporate

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1. All references to ERISA sections will be to those found in the United States Code.

2. Throughout this opinion, the term "retirees" is used interchangeably with "regular retirees." The term "retirees" or "regular retirees" refers to all eligible non-union retired and disabled participants, and their eligible beneficiaries who retired under the basic medical plan in existence at the time of their retirement.

The term "early retirees" denotes those individuals who retired under a voluntary early retirement incentive program ("VERIP"). Although most of the early retirees have settled with Unisys, and thus are not the subject of this opinion, some early retiree plaintiffs remain and the designation of the two groups therefore retains significance.

structure. Sperry consisted of several business units, or divisions, and each division had its own medical plan.[3]

Following the merger, Unisys maintained all of the separate medical benefits plans for retirees which meant that Unisys was administering approximately 75 plans.[4] This situation was described by one Unisys executive as a "royal administrative headache."[5] (Tr. 1/12/94 at 101, Loughlin.)

On November 3, 1992,[6] Unisys made an announcement that no retiree, or early retiree for that matter, wanted to hear. Unisys announced that effective January 1, 1993, it was replacing all pre-existing medical plans with the Unisys Post-Retirement and Extended Disability Plan ("the new plan"). Under the new plan, retirees and early retirees would be responsible for increasing levels of contribution until finally, come January 1, 1995, they would have to pay the full cost of their premiums.[7] The new plan contrasted sharply with ear-

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3. In fact, even within a single division several plans existed. The multiplicity of plans resulted from the practice of maintaining the plan an individual retired under and not necessarily passing along changes when a new plan was later implemented at the division.

Until 1984, each Sperry division (i.e. Sperry Univac, Sperry Vickers, etc.), as well as the Sperry Executive Offices ("the Executive Offices"), maintained its own medical benefits program. In 1984, Sperry established a corporate-wide plan known as Medflex ("Medflex"). However, Medflex did not affect the benefits of individuals who retired prior to its implementation, and thus the vast number of plans continued.

4. Neither side could say definitively how many plans were being administered but 75 was one rough estimate. (Tr. 1/12/94 at 99, Loughlin.)

5. References to the trial transcript shall be identified by date, page and witness and cited as "Tr." References to deposition transcripts shall be identified by exhibit number, page and witness and cited as "Dep." following the witnesses' name. Plaintiffs' and defendant's exhibits shall be identified as "P.Exh." and "D.Exh." respectively. Post-Trial Stipulations shall be identified as "P-T Stip."

6. Although both parties concede that Unisys made the public announcement on November 3, 1992, the letter it sent to those affected by the decision was dated October 30, 1992. (P.Exh. 533A.)

7. Unisys' action was prompted, at least in part, by the issuance of the Financial Accounting Standards Board Statement No. 106 ("FAS 106").

lier plans. Under the majority of the pre-existing plans, Unisys paid the entire premium for the individual's life and provided benefits for the individual's spouse as well.

Unisys' decision led to an onslaught of lawsuits filed in no less than four jurisdictions, including six cases in this court.[8] The Judicial Panel on Multidistrict Litigation transferred all other lawsuits here for consolidated disposition. *See* 28 U.S.C. § 1407. On June 9, 1993, after determining that Unisys "acted on grounds generally applicable to the class," the court certified this case as a class action pursuant to Fed. R. Civ. P. 23(b)(2).

Plaintiffs argue that Unisys' termination of their respective medical plans violated ERISA. First, plaintiffs contend that Unisys denied them "vested" benefits in violation of 29 U.S.C. § 1132(a)(1)(B). In essence, plaintiffs argue that because the summary plan descriptions ("SPDs") explaining their medical benefits contained the term "lifetime" benefits, Unisys created "vested" benefits that it could not take away

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FAS 106 required that for fiscal years beginning in 1992, employers accrue an expense against current income for the expected future cost of post-retirement benefits and to recognize on its balance sheet a liability for unfunded benefit costs. (*See* Tr. 1/12/94 at 55, Loughlin.) *See also* Rick Stephan Hayes & Richard C. Baker, *New Health Benefits Rule Has Big Impact on Businesses and Workers: Financial Accounting Statement Number 106,* Bus. F., Sept. 22, 1993 (noting that Unisys developed its plan to phase out medical benefits to reduce its one-time FAS 106 cost).

8. The consolidated action includes the following suits: *Lofaso v. Unisys Corp.*, No. 92-5429 (E.D.N.Y. filed Nov. 17, 1992); *Yerkes v. Unisys Corp.,* No. 92-6906 (E.D. Pa. filed Dec. 2, 1992); *Romano v. Unisys Corp.,* No. 92-6938 (E.D. Pa. filed Dec. 3, 1992); *Pronk v. Unisys Corp.,* No. 3-92-812 (D. Minn. filed Dec. 4, 1992); *McMahon v. Unisys Corp.,* No. 93-0704 (E.D. Pa. filed Feb. 9, 1993); *Mercure v. Unisys Corp.,* No. 2:93-CV-71055 (E.D. Mich. filed Mar. 11, 1993); *Valle v. Unisys Corp.,* No.93-1431 (E.D. Pa. filed Mar. 18, 1993); *Bennett v. Unisys Corp.,* No. 93-1668 (E.D. Pa. filed Mar. 30, 1993); and *Weniger v. Unisys Corp.,* No. 93-2997 (E.D. Pa. June 4, 1993). A tenth action, *Skolnick v. Unisys Corp.,* No. 93-8287 (S.D. Fla.), was brought to the attention of the Judicial Panel on Multidistrict Litigation on June 4, 1993 by the parties, but it apparently was never formally transferred to this court for adjudication.

once an individual retired.[9] Unisys responds that it clearly reserved its right to terminate the plans in a reservation of rights clause ("ROR") and that the lifetime language is not inconsistent with the ROR. Unisys denies ever having created "vested" medical benefits through its use of the word "lifetime." Second, plaintiffs argue that even if Unisys had the legal authority to terminate the plans, it breached its fiduciary duty by failing to explain to retiring employees that "lifetime" was really a qualified promise subject to the ROR.[10] Finally, plaintiffs assert an equitable estoppel claim.

On October 13, 1993, this court issued an opinion addressing Unisys' motion for partial summary judgment. *See In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 837 F. Supp. 670 (E.D. Pa. 1993) [hereinafter *In re Unisys*]. That decision disposed of all claims brought by the regular retirees of Burroughs and Unisys.[11] As to the regular retirees of Sperry, this court denied Unisys' motion for summary judgment with respect to the plan-based claims but granted sum-

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9. As discussed in Section IIB2d, *infra*, plaintiffs make a distinction between active employees ("actives"), who are not the subject of this litigation, and those individuals who had retired. Plaintiffs contend that once an individual retired, his or her benefits "locked-in," whereas an active employee's benefits were always subject to change even in the face of lifetime language. Defendant vigorously denies that there was or is any distinction between the application of the reservation of rights clause to actives and retirees.

10. Plaintiffs apparently rely on 29 U.S.C. § 1132(a)(3)(B), the "other equitable relief" section, as the basis for their breach of fiduciary duty claim. *See Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1293-94 (3d Cir. 1993) (holding that a direct action for breach of fiduciary duty exists in the "other appropriate equitable relief" clause of 29 U.S.C. § 1132(a)(3)(B)).

Section 1109, which makes fiduciaries liable for the breach of certain duties, only provides for recovery to a *plan*, whereas here the plaintiffs are pursuing remedies on their own behalf. Recently, the Court of Appeals for the Third Circuit explicitly held that damages for breach of fiduciary duty may not be recovered under 29 U.S.C. § 1132(a)(1)(B). *Haberern v. Kaupp Vascular Surgeons Ltd.*, No. 93-1892, *slip op.* at 18 (3d Cir. May 25, 1994).

11. The Burroughs and Unisys plan documents did not contain "lifetime" language. *In re Unisys*, 837 F. Supp. at 677, n.11.

mary judgment on the claim for breach of fiduciary duty ("BOFD") and estoppel.[12] None of the claims of the early retiree plaintiffs was addressed as no motion for summary judgment had been made in that regard. *Id.* at 672.

Following the summary judgment opinion, the court held a seven-day trial on the remaining claims. After listening to the testimony of more than 80 witnesses, admitting approximately 800 exhibits, and considering thoroughly drafted briefs by both sides, the court now has the formidable task of adjudicating this matter. Following the trial, but prior to closing arguments which were held on April 18, 1994, the Sperry and Burroughs early retirees reached a settlement with Unisys; a fairness hearing on the settlement agreement is scheduled for later this summer. The Honorable Louis C. Bechtle, who has extensive expertise in complex litigation, acted as settlement judge and the court acknowledges his considerable efforts in bringing an amicable resolution to part of this controversy. Therefore, this opinion addresses only those claims made by the Sperry regular retirees, and the Unisys early retirees.[13]

Because the parties briefed, argued and presented the Sperry regular retiree claims separately from the Unisys VERIP claims, this court makes distinct findings of fact and conclusions of law for the two groups. Section II addresses the claims of the Sperry retirees, while Section III addresses the Unisys VERIPs.

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12. The Sperry plaintiffs have moved for reconsideration of the denial of their BOFD claim and their estoppel claim. These claims are dealt with in Section IIB3 and IIB4 respectively, *infra.*

13. Early retirees of Unisys include those individuals who retired under VERIPS that Unisys offered in 1989 and 1991.

II. THE SPERRY RETIREES

A. FINDINGS OF FACT

1. Background Events

1. In September of 1986, Sperry and Burroughs merged to form Unisys. (P-T Stip. at ¶ 2.)

2. Prior to the merger, Sperry consisted of a combination of business units, or divisions. These included Sperry Division, Sperry Univac, Sperry New Holland, Sperry Vickers, Sperry Flight Systems and Sperry Remington. (P-T Stip. at ¶ 3.)

3. In addition to these divisions, Sperry maintained corporate offices, known as the Executive Offices. (P-T Stip. at ¶ 4.) Until 1986, the Executive offices were headquartered in New York City. Thereafter, they were headquartered in Blue Bell, Pennsylvania. *(Id.)*

4. Until 1984, each Sperry division, as well as the Executive Offices, maintained its own medical benefits program. Each was described in a separate SPD.

5. In 1984, in an attempt to streamline the medical benefits plans and in response to rising medical costs, Sperry implemented Medflex, a corporate-wide medical benefits plan that applied to the entire Sperry Corporation. (D.Exh. 84 at 029951.)

6. Medflex applied to all Sperry business units by January 1, 1984, with the exception of one sub-group of the Sperry Division, which commenced participation in Medflex on January 1, 1985. (P.Exh 667 at 028677; P.Exh. 565 at 83-84, Loughlin Dep.)

7. Medflex was less generous than previous plans, (P.Exh. 565 at 84-86, Loughlin Dep.; Tr. 1/12/94 at 98, Loughlin), and applied to future retirees only. Existing retirees continued to receive coverage under the pre-Medflex plans which applied when they retired. (D.Exh. 84 at 029958; P.Exh. 565 at 83, Loughlin Dep.; Tr. 1/12/94 at 98, Loughlin; P.Exh. 589 at 125, Sweeten Dep.) The prospective application of Medflex was

consistent with Sperry's overall practice of not changing a retiree's medical plan — in general, past practice showed that once an employee retired, Sperry did not reduce his or her medical benefits.

8. Following the merger in 1986, Unisys continued the Medflex plan for active employees and for those who retired after its implementation but prior to April 2, 1989. Unisys also continued all of the pre-Medflex plans for those who retired prior to Medflex's implementation. (P.Exh. 509A at 009577.)

9. In the spring of 1989, Unisys created the Unisys Post-Retirement and Extended Disability Plan. (D.Exh. 2.) It only applied to employees who retired on or after April 2, 1989.

10. In December, 1990, the Financial Accounting Standards Board ("FASB") issued FASB Statement No. 106 ("FAS 106"). For fiscal years beginning after December 15, 1992, FAS 106 requires an employer to accrue an expense against current income for the expected future costs of post-retirement benefit obligations and to recognize on its balance sheet a liability for unfunded benefit costs. Under this new standard, an employer could no longer follow the common practice of accounting for post-retirement benefits on a "pay-as-you-go" basis. (D.Exh. 93.)

11. The issuance of FAS 106 constituted a precipitating factor for Unisys' decision to terminate all existing plans. (Tr. 1/12/94 at 55, Loughlin.)

12. On November 3, 1992, Unisys publicly announced that effective January 1, 1993, it was terminating all existing medical benefits plans and replacing those plans with the new Unisys Post-Retirement and Extended Medical Plan ("the new plan"). (P.Exh 533A at 057462; Tr. 1/12/94 at 54, Loughlin.)

13. Under the new plan, retirees are responsible for increasing levels of contribution until January 1, 1995, after which they will have to pay the full cost of their premiums.

2. The Summary Plan Descriptions[14] and General Plan Information

14. Prior to the introduction of Medflex in 1984, each Sperry division maintained its own medical benefits program which was described in explanatory booklets, and later in formal SPDs.[15]

a. Medflex

15. The SPD for the Medflex plan ("Medflex SPD") was set forth in a booklet titled "Your Company and You." (D.Exh. 8; P. Exh. 637).[16]

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14. In an attempt to make the Findings of Fact ("FOF" or "Findings") as clear as possible, the findings relating to the SPDs will be sub-headed by business units (i.e. Sperry Univac, Sperry Vickers, etc.). This should not, however, be taken as support for the proposition that sub-classes by business unit are necessary for purposes of the conclusions of law, an issue on which the parties disagree, and which will be dealt with in Section IIB1, *infra*.

Since Medflex was a corporate-wide plan which applied to all of the business units, the court begins with the Medflex Plan SPD.

15. ERISA did not require employers to issue SPDs until 1977. The SPD requirements are set forth in 29 U.S.C §§ 1021, 1022 and 1024.

16. Although certain sections of "Your Company and You" that were distributed within each of the Sperry business groups and locations varied, the parties agreed that for the purposes of this litigation, the version cited to is materially identical to all versions of "Your Company and You" distributed to the various business groups in 1984-1986. (Parties' Joint Stip. at 1, n.1.) Defendant's Exhibit 8 and Plaintiffs' Exhibit 637 are copies of the same SPD; the court will hereinafter refer to D.Exh. 8 when discussing this document.

In addition to the formal SPD (D.Exh. 8), the plaintiffs also refer the court to a five-page summary which explains retirement benefits under the Medflex Plan. (P.Exh. 640.) Plaintiffs suggest that this is actually the plan document covering retirement health benefits for retirees under the Medflex Plan. (*See* Pl. Proposed FOF at ¶ 333-334.) Plaintiffs' reliance on this document stems from the fact that it contains lifetime language but makes no mention of the ROR.

Although the court recognizes that first Sperry and then Unisys regularly distributed this summary to former Sperry retirees, (P.Exh. 63; P.Exh. 76; P.Exh. 79; P.Exh. 80), and thus may have misled those who received it to believe incorrectly that the ROR did not apply to them, this document is nothing more than a quick reference sheet. The document is exactly what it says it is: "a brochure summariz[ing]" the key provisions of the Sperry

16. The Medflex SPD contains a Table of Contents ("TOC"). (D.Exh. 8 at 027826-027832.) The TOC is divided into bold-faced sections including: Local Information; Your Company; Your Job; Time Off; Disability; Travel Accident; Life Insurance; Your Medical Plan; Your Dental Plan; Flexible Spending Program; Retirement Program; Employee Stock Ownership Plan; Other Items; ERISA Information.

17. The sections most pertinent to this litigation are the sections titled "Your Medical Plan" and "ERISA Information." (D.Exh. 8 at 027829, 027832.)

18. The section titled "Your Medical Plan" contains a subsection titled "Coverage at Retirement." (D.Exh. 8 at 027921.) This subsection contains the language that plaintiffs claim entitles them to vested medical benefits, at no cost. This subsection provides in relevant part:

> If you're eligible, *Medical Plan benefits continue without cost after you terminate active employment.* Benefits also may continue on a contributory basis for your eligible dependents who were covered when your employment terminated. . . . *Coverage continues for you for life* and for your dependents while they remain eligible provided you don't stop the contributions for their coverage. After your death, your eligible dependents may continue coverage by making the required contributions. Their coverage continues until your spouse dies or remarries.

(D.Exh. 8 at 027921 (emphasis added).)

19. Two pages later, there is a section titled "Termination of Coverage." Although this section is not directed specifically to retirees and is not the ROR clause upon which defendants primarily base their defense, this section provides added support for defendant's position. This section provides in relevant part:

Medical Plans for eligible employees retiring after January 1, 1984 . . . ." (P.Exh. 640 at 028024.) It does not contain any of the formalities required of an SPD, *see* 29 U.S.C § 1022(b), and specifically says in italics: "This brochure summarizes only the key features of your Post-Retirement Medical Plan and does not attempt to cover all the details. These are provided in the official Plan documents which legally govern." (P.Exh. 640 at 028028.)

Medical Plan coverage for you terminates when any of the following occur:

- your employment terminates for reasons other than retirement or disability
- you cease to meet the eligibility requirements
- *the Plan is discontinued*

. . . whichever occurs first.

(D.Exh. 8 at 027923 (emphasis added).)

20. Approximately eighty pages after the "lifetime" language appears, a subsection titled "Plan Continuation," appears in the "Other Items/ERISA Information" section. This subsection contains what the parties refer to as the ROR, and is the clause on which the defendants primarily rely for their defense. This section provides in relevant part:

> *The Company expects to continue the Plans, but reserves the right to change or end them at any time.* The Company's decision to change or end the Plans may be due to changes in federal or state laws governing welfare or retirement benefits, the requirements of the Internal Revenue Code or ERISA, the provisions of a contract or a policy involving an insurance company *or any other reason.* A Plan change may transfer assets and liabilities to another Plan or split a Plan into two or more parts. If the Company does make a change or ends a Plan, it may decide to set up a different Plan providing similar or identical benefits.
>
> However, full benefits under the Plans will be provided as follows:
>
> Life Insurance Plan — for deaths that occur before the death or modification or termination
>
> *Health Care Program and Dental Plan — for covered expenses that are incurred before the date of modification or termination*

> Short Term Disability and Long Term Disability Plans — for covered disabilities that begin before the date of modification or termination, and
>
> Voluntary Indemnity Plan — for covered deaths or accidents that occur before the date of modification or termination
>
> *If the Sperry Retirement Program [Sperry's Pension Plan] should be ended, you will have a vested or nonforfeitable right to* the accrued benefit you have earned under Part A. Under Part B you would receive the full value of your accounts including employer contributions and earnings but less any expenses incurred. . . .
>
> In addition, if the Employee Stock Ownership Plan should be changed or ended, you will continue to have a nonforfeitable right to your full account balance at the time of the change or termination. The Plan is subject to initial and continuing approval under federal regulations. Currently no government provision exists for Plan continuation beyond 1987.

(D.Exh. 8 at 028008-028009 (emphasis added).)

21. In discussing what benefits would still be provided in the event of a plan termination, the ROR makes no mention of medical benefits other than for coverage of expenses incurred before the date of modification or termination. (D.Exh. 8 at 028008-028009.) Yet, the ROR alerts individuals that they will have a vested or nonforfeitable right to certain pension accruals. (D.Exh. 8 at 028009.)

22. One of the key individuals involved with the development and implementation of Medflex was Frank Sweeten ("Sweeten"). (P.Exh. 615 at 11, 13, Sweeten video-Dep.[17])

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17. In some cases, the plaintiffs presented witnesses by video deposition and then submitted the text of the deposition. References to these depositions will be identified as "video Dep."

23. Sweeten worked for Sperry from 1961 until his retirement on January 1, 1986,[18] under the Medflex and Executive Medical Plans. (P.Exh. 615 at 30, Sweeten video-dep.) At the time of his retirement, Sweeten held the position of Senior Vice-President of Personnel. Prior to holding that position, Sweeten held the positions of Vice-President of Personnel, Staff Vice-President of Personnel for Sperry, Vice-President of Personnel for the Univac Division, Director of Labor Relations for the Univac Division, and Director of Labor Relations for the Remington Rand Group. Sweeten was a member of the Sperry Corporation Employee Benefits Executive Committee from 1975 to 1985. (P-T Stip. at ¶ 74.)

24. Sweeten understood the lifetime language in the Medflex SPDs, as far as retirees were concerned, to mean just that — for life.[19] (P.Exh. 615 at 14-16, Sweeten video-Dep; P.Exh. 589A at 67-68, 69-73, Sweeten Dep.)

25. Sweeten believed that the ROR applied to retirees only in situations where an amendment or termination was required by law.[20] (P.Exh. 589A at 67, 70, Sweeten Dep.)

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18. Sweeten retired prior to the merger. (P.Exh. 615 at 5, Sweeten video-Dep.)

19. For example, Sweeten testified: "My understanding was that the language provided that when an employee retired under the Medflex plan, at the time he or she was to get lifetime medical benefits and his spouse also." (P.Exh. 615 at 14, Sweeten video-Dep.) Sweeten also testified: "If you said these are your benefits until and unless the company amends or changes the plan, that would have been one thing, but we didn't. We said this is yours for life. You have got it for life. And people made decisions on that. They decide whether to go or not go on the basis that they were told this is life." (P.Exh. 589A at 73, Sweeten Dep.) Defendant, of course, argues that the ROR alerted individuals that the benefits might end before their lifetime.

20. Sweeten testified: "And as to the retirees concerned, we always, it's always my understanding and the policy I administered was that they were for lifetime and that that language, the reservation language, where it applied to retiree part of it [sic], was for situations where we might be required to amend by virtue of mandate of law. . . . And although we gave a lifetime benefit to the retiree when he went out, there was that potential that we could through court law or some other government mandate be forced to modify or change it, but not that the company would unilaterally

The ROR contains no language to support this understanding. (D.Exh. 8 at 028008; P.Exh. 615 at 19-20, Sweeten video-Dep.) Although the ROR mentions that a change in law is one of the reasons the Company would terminate the plans, the ROR is not limited to such a situation and makes no distinction between its application to active employees versus retirees. (D.Exh. 8 at 028008.)

26. Another key individual involved with the design and implementation of Medflex was Michael Losey ("Losey"). (Tr. 1/13/94 at 13, Losey).

27. Losey is currently the President and Chief Executive Officer ("CEO") of the Society for Human Resource Management ("SHRM"). Losey previously was employed in various human resources positions with Sperry and Unisys from 1964 until his resignation in 1990. From 1974 to 1983, Losey was Vice-President of Personnel for Sperry New Holland and was a member of the Sperry Corporation Personnel Council. From 1983 to 1986, Losey was the Staff Vice-President of Compensation and Benefits for Sperry Corporation. In 1986, Losey became Vice-President of Human Resources for Unisys, a position he held until he left the company for his current position with SHRM. Losey also served as a non-member officer of the Sperry Corporation Employee Benefits Executive Committee. Losey testified on January 13, 1994. (P-T Stip. at ¶ 83.)

28. Losey participated in the overall drafting of the Medflex SPD, including the drafting of the ROR contained in the plan. (Tr. 1/13/94 at 13-14, Losey.) Losey testified that the lifetime language found in Medflex is a "descriptive phrase" indicating "that it was *the intent* of the company when the people retired under post[-]retirement medical to continue it to their death." (Tr. 1/13/94 at 14, Losey (emphasis added).)

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or arbitrarily withdraw or change the benefits." (P.Exh. 589A at 67, Sweeten Dep.)

29. However, Losey emphatically stated that under no circumstances was the use of the words "for life" meant to override the ROR. (Tr. 1/13/94 at 14-15, Losey.)

b. Pre-Medflex SPDs: Sperry Univac

30. Sperry/Univac/Computer Systems/Information Systems ("Univac") manufactured and marketed computer systems and office equipment. (P-T Stip. at ¶ 3a.)

31. In the early years at Univac, there was no discussion of "lifetime" retiree medical benefits. The earliest Univac SPD, submitted to the court, that contained the "lifetime" language was issued in 1977 at the Recording & Statistical unit of Univac. (P.Exh. 645 at 026552.)

32. The section titled "Retirement Benefits/Medical Benefits" provides in relevant part:

> When you retire from [name of group within Univac], the Comprehensive Medical Expense Benefits then in force for you and your eligible dependents under this Plan *will be continued for the rest of your life,* provided you have attained 55 years of age and completed 15 years of service at the time of your termination of employment.

(P.Exh. 645 at 026552 (emphasis added).)[21]

33. Two pages after the lifetime language appears in this document, there is a section titled "Plan Continuation" which provides in relevant part:

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21. Although the plaintiffs direct the court to this provision about lifetime coverage, (P.Exh. 645 at 026552), this SPD actually provides conflicting information about the duration of coverage which was not explained by the parties. (Compare P.Exh. 645 at 026541 with 026552.) While the section quoted above speaks of lifetime coverage for retirees, another section of the SPD provides that your [medical] insurance and that of your dependents will terminate on "a date determined by whichever of the following produces the earliest date of insurance termination," and then lists as one of those events "[when] your employment terminates, *you retire . . . .* " (P.Exh. 645 at 026541 (emphasis added).) This passage would suggest that benefits cease at retirement, at least for all of those retirees who do not meet the age and service requirements necessary for the "lifetime" coverage.

> Sperry Rand Corporation hopes to be able to continue this Plan indefinitely, but reserves the right to modify or discontinue it *at any time.*

(P.Exh. 645 at 026554 (emphasis added).) This ROR is significantly shorter and less detailed than the one later used in the Medflex SPD, although both provisions expressly give the Company the right to terminate the plan "at any time." (*Compare* FOF 20.)

34. Although the Recording & Statistical unit of Univac began using the lifetime language as early as 1977, other groups within Univac continued to provide benefits only through age 65. In the summer of 1980, however, Univac extended retiree medical benefits for life to all future retirees of Univac. This change, from benefits ending at age 65 to life, also applied retroactively to those who had retired on or after September 30, 1974. (D.Exh. 104; P.Exh. 159; P.Exh. 160; P.Exh. 161.)

35. Univac announced its decision to extend the benefits from age 65 to life in a June 10, 1980 letter sent to active employees by R.D. Bosin ("Bosin"), Vice-President of Personnel for Univac, which stated in relevant part:

> It is my pleasure to inform you of improvements to your employee benefit program that will become effective on July 1, 1980. These new improvements significantly add to the value of the benefits available to you when you retire and offer important protections *to you now and in the years ahead.*
>
> The following pages itemize your program improvements in greater detail. In summary they are:
>
> . . . Post-Retirement medical coverage will continue for your lifetime and for the lifetime of your spouse.

(P.Exh. 159 at 058446 (emphasis added).) [22]

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22. Univac sent a similar announcement out two months later to those who had retired prior to the change but who were now eligible for the increased benefits. (P.Exh. 165 at 025793-025794.) Univac enclosed with this letter a 10-page description of the benefits titled "Post-Retirement

36. This letter (the "Bosin letter"), which was representative of the letters sent out to employees at different Univac locations, did not mention that the company reserved its right to amend or terminate the plan. (P.Exh. 159.)

37. John Stahl ("Stahl") helped prepare the Bosin letter. (Tr. 11/23/93 at 69-70, Stahl; P.Exh. 568 at 59, Stahl Dep.[23])

38. Stahl worked for Sperry, and its predecessors, from February 26, 1945 to March 30, 1984, and retired at age 57 under one of the VERIP offerings. Prior to his retirement, Stahl held the positions of Director of Employee Benefits for the Sperry Univac Division; Staff Director, Policy and Administration in Blue Bell, Pennsylvania; and Manager of Personnel Records and Administration for Univac in New York City. Stahl testified in person on November 23, 1993, and by deposition submitted on January 13, 1994. (P-T Stip. at ¶ 71.)

39. Stahl testified that when he drafted the Bosin letter, and specifically the sentence providing that the improvements would "offer important protections to you now *and in the years ahead*," (P.Exh. 159 at 058446 (emphasis added)), his "intention was to give employees assurances that, with respect to the continuation of medical coverage and retirement, that it meant — that lifetime meant lifetime, meaning to the end of your life." (Tr. 11/23/93 at 73, Stahl.)

Plan/Comprehensive." (*Id.* at 025795.) Nowhere in this document did the company mention its reserved right to terminate the plan. Plaintiffs seem to suggest that this document constituted the Univac SPD from 1980-1982, until a formal SPD incorporating the lifetime change was published in 1982. (*See* Pl. Proposed FOF at ¶ 122, 126.) The court is not persuaded. Again, this document does not contain the necessary formalities to be an SPD. *See* 29 U.S.C. § 1022(b). Rather, this explanation of the medical benefits program presumably was incorporated into the existing SPD, which contained a ROR notably allowing amendments to the plan.

23. The parties designated Stahl's deposition in a separate binder without an exhibit number. Because the plaintiffs included the entire deposition as their exhibit 568, the court cites to this exhibit for convenience of reference. However, it should be noted that only portions of this deposition are included in the record and the actual designations can be found in the binder titled "Defendant's Deposition Designations." This deposition was taken on November 4, 1993.

40. Stahl also testified, however, that the primary message of the Bosin letter was to inform participants that their coverage would now extend beyond age 65, (P.Exh. 568 at 60, Stahl Dep.), which is consistent with defendant's position that lifetime simply was a durational term.

41. Furthermore, Stahl testified that the phrase "Post-retirement medical *coverage* will continue for your lifetime and for the lifetime of your spouse," referred to the coverage in the company's medical plan, which was set forth in an SPD that expressly contained a ROR clause. (Tr. 11/23/94 at 106, Stahl.)

42. Although the announcement of lifetime coverage was made in 1980, a formal SPD incorporating this new language was not published until 1982. (P.Exh. 641; D.Exh. 9.[24])

43. Univac published the 1982 Univac SPD in an employee handbook titled "Your Company and You" ("the employee handbook"),[25] which Univac specifically designed as a looseleaf binder so that when it made changes to the SPD, it could simply remove and replace individual pages. (P.Exh. 641 at 024688.) This handbook was a comprehensive booklet covering the entire range of personnel policies and employee benefits programs. It was not limited to explaining the medical benefits program. (P.Exh. 641.)

44. The employee handbook contains a TOC. (P.Exh. 641 at 024689-024693.) The TOC is divided into bold-faced sections including: Local Information; Your Company; Your Job; Time Off; Disability; Travel Accident; Medical and Life; Dental; Retirement; Other Items; ERISA Information. (*Id.*)

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24. The parties agree that P.Exh. 641, which is the same document as D.Exh. 9, is materially identical to all versions of the 1982 SPD that Univac distributed at its other locations. (P-T Stip. at 2, n.2). Because P.Exh. 641 is identical to D.Exh. 9, the court will hereinafter refer to P.Exh. 641 when referring to this document.

25. Although both booklets have the same name, this booklet is not the same as the Medflex SPD, "Your Company and You," discussed in Finding 15.

45. Within the TOC section titled "Medical and Life," is a subsection which also appears in bold titled "Comprehensive Medical Plan." (P.Exh. 641 at 024691.) Beneath this section are still further subsections with accompanying page numbers directing an individual to the appropriate page. One of the subheadings that appears beneath "Comprehensive Medical Plan" is "Coverage at Retirement," which appears at page G-22 of the employee handbook. (P.Exh. 641 at 024692.)

46. The "Coverage at Retirement" section provides in relevant part:

> Coverage *will continue* for you and your Eligible Dependents *throughout your lifetime*, and for the lifetime (or until remarriage) of your spouse.

(P.Exh. 641 at 024786 (emphasis added).)[26]

47. The medical benefits section of the handbook does not contain a ROR. However, at the very end of the employee handbook, approximately eighty-five pages after the "lifetime" language appears, there is a section titled "Termination of Plans," which appears in the "Other Items/ERISA Information." (P.Exh. 641 at 024881.) This section provides in relevant part:

> The Company intends to continue *all of the plans* described in this handbook indefinitely, *but of course retains the right to modify or terminate them at any time.*
>
> However, full benefits under the plans will be provided as follows:
>
> Life Insurance Plan — for deaths that occur before the date of modification or termination.
>
> *Comprehensive Medical Plan and Dental Plan — for covered expenses that are incurred before the date of modification or termination.*

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26. It should be noted that not every retiree was eligible for this lifetime coverage. The SPD also contained age and service requirements, (*see* P.Exh. 641 at 024785), but since they are not material to this litigation the court will not discuss them.

> Short Term Disability and Long Term Disability Plans — for covered disabilities that begin before the date of modification or termination.
>
> Voluntary Indemnity Plan — for covered deaths or accidents that occur before the date of modification or termination.
>
> Income Assistance Plan — for covered employee terminations that occur before the date of modification or termination.
>
> In addition, if the Sperry Retirement Program [the Pension Plan] should be terminated or contributions completely discontinued, Program members will be fully vested in their rights under the Program to the extent then funded, and benefits will be paid in the order of priority set forth in the Program document and as prescribed by law.

(P.Exh. 641 at 024881 (emphasis added).)

48. The ROR makes clear that it applies to "*all*" plans, and therefore is broad enough to encompass the medical plan. In discussing what benefits would still be provided in the event of a plan termination, the ROR makes no mention of medical benefits other than for coverage of expenses incurred before the date of modification or termination. (P.Exh. 641 at 024881.)

49. It is clear, however, that some of the top Univac personnel did not believe that the ROR applied to a retiree's medical program. (*See, e.g.*, Tr. 11/23/93 at 256-57, Kaskey;[27]

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27. Dr. Gilbert Kaskey ("Dr. Kaskey") worked for the Univac Division of Sperry Corporation and Unisys from January 17, 1955 to January 23, 1987, and retired at age 62 as a regular retiree. Dr. Kaskey was a member of the Sperry Corporation Personnel Council from 1981 to 1985. He was a member of the Sperry Corporation Employee Benefits Executive Committee in 1985 and 1986. At the time of his retirement, Dr. Kaskey was Senior Vice-President for Human Resources at the corporate headquarters. Prior to this position, Dr. Kaskey was Director of Human Resources for the Univac Marketing Division and divisional Vice-President of Human

Tr. 11/23/93 at 159-60, Ives;[28] Tr. 11/23/93 at 327-29, 338, Hain.[29])

Resources for Univac. Dr. Kaskey testified in person on November 23, 1993, and by deposition submitted on January 13, 1994. (P-T Stip. at ¶ 41.)

In relevant part, Dr. Kaskey testified:

Q: Okay. Let me ask you, in your capacity as divisional vice president of the Univac Division at the time this handbook was issued, what did you understand to be the effect, if any, of the reservation clause as compared to a promise of benefits for life or lifetime, whatever the handbook said about that?

A: I interpreted the reservation clause to be a reservation on the part of the company regarding current employees. So that they had the right at any time to, at the extreme, terminate one of the plans, but certainly not as far as retirees were concerned.

(Tr. 11/23/94 at 256-57, Kaskey.)

28. Paul Ives ("Ives") worked for Sperry, and later Unisys, from 1956 to 1987, and left the company on January 16, 1987, at the age of 60. Ives retired as a regular Sperry retiree. Ives was a member of the Sperry Corporation Personnel Council from the early 1970's to 1987. At the time he left the company, Ives held the position of Vice-President of Human Resources for the Defense Products Group. Ives testified on November 23, 1993. (P-T Stip. at ¶ 38.)

In relevant part, Ives testified: "My understanding of this clause [the ROR] was simply that it applied to the current work force, not to people already retired." (Tr. 11/23/94 at 159-60, Ives.)

29. Roy Hain ("Hain") worked for Sperry, and later Unisys, and its predecessors, from 1952 to 1986. Hain retired on November 30, 1986, at age 58 under the Special Voluntary Retirement Plan (SAM60) retirement offering. At the time of his retirement, Hain was a Manager of Employee Services and Benefits. Hain testified on November 23, 1993. (P-T Stip. at ¶ 32.)

It should be noted that Hain's testimony about the inapplicability of the ROR clause to retirees specifically concerned those who retired under the Sperry VERIPs, a group that is no longer part of this litigation. However, there was no indication in the record, and neither party ever argued, that the ROR applied differently to retirees under the VERIPs than the regular retirees.

In relevant part, Hain testified:

Q: [A]nd did there ever occur in any of these situations a specific question or concern that in spite of the lifetime language you were giving, that the company could take this away, that it could reduce it or eliminate it after retirement?

c. Sperry Vickers

50. Sperry Vickers ("Vickers") manufactured fluid power systems and was sold to Libbey Owens Ford effective January 1, 1984. (P-T Stip. at ¶ 3b.)

51. Until March, 1979, Vickers only provided post-retirement medical benefits through the age of 65. (Tr. 11/23/93 at 204, Duncan; Tr. 11/24/93 at 136-37, Lyng.)

52. In February, 1979, Vickers announced in a letter to its active employees that effective March 1, 1979, it was providing increased medical benefits. (P.Exh. 119.) One of the improvements was that medical coverage would no longer cease when an individual became eligible for Medicare (i.e. in most cases at age 65) but rather would cease "at death." (P.Exh. 119 at PL01732.) In 1980, Vickers extended the same improvements to those who had retired prior to the 1979 announcement. (P.Exh. 121; Tr. 11/24/93 at 151-52, Lyng.)

53. The signatory of the 1979 announcement letter sent to actives was Lawrence Lyng ("Lyng"), Vice-President of Personnel for Vickers. (P.Exh. 119 at PL01733.) Lyng worked for Sperry Vickers from 1978 to January 1, 1984, when Vickers was sold by Sperry to Libbey Owens Ford. Lyng retired from Vickers in 1991. Lyng was a member of the Sperry Corporation Personnel Council from 1979 to 1983. At the time of

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A: There — there wasn't too many questions of that concern, but there were a couple, yes.

Q: Okay. And on occasion, when those were raised, did people actually point out the reservation of rights language that existed in the handbooks?

A: Yes, they did.

Q: Okay. And based on that, did you have occasion to tell people what your opinion was to that?

A: Yes.

Q: And what did you tell them?

A: I told them — that it was my understanding that this pertained to active employees and not to retirees. That retirees, once they received their medical benefit, they would be continued for their lifetime and their spouse's lifetime.

(Tr. 11/23/94 at 327, Hain.)

the sale of Vickers to Libbey Owens Ford, Lyng was Vice-President and General Manager of North American Commercial Operations for Vickers. Prior to this position, from 1975 through 1982, Lyng was Vice-President of Personnel for Sperry Vickers. Lyng testified on November 24, 1993. (P-T Stip. at ¶ 45.)

54. The signatory of the 1980 announcement letter sent to retirees was John T. Burns ("Burns"), then President of Vickers. (P.Exh. 121 at 028437.) Burns was not a witness at trial.

55. Although members of Vickers management considered, and often communicated to employees, that these changes to post-retirement medical benefits constituted a new "plan," (Tr. 11/24/93 at 140-41, Lyng; Tr. 11/23/93 at 204-05, 216[,] Duncan),[30] the court finds that the switch-over to "lifetime" language was simply an amendment to the pre-existing plan. (D.Exh. 112 at 099744-47; D.Exh. 107 at 099313; Tr. 1/12/94 at 24-25, Loughlin.)

56. However, the Vickers group of retirees is in a unique position in that the Company never issued a formal SPD embodying the lifetime language. (Tr. 11/23/93 at 216, 233-36, 239-40, Duncan; Tr. 11/24/93 at 165, Lyng.)

57. The last SPD ever published for Vickers was a 1977 SPD that pre-dated the "lifetime" language. (D.Exh. 18.)

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30. Members of Vickers management believed that this "new plan" applied differently to actives and retirees. Theodore A. Duncan ("Duncan"), who was the President of Vickers from 1980-1987 (P-T Stip. at ¶ 21), testified that to the best of his knowledge, Vickers did not reserve the right to reduce or terminate this "new" lifetime coverage as far as retirees were concerned, although he said Vickers always reserved the right to change or terminate an active employee's coverage. (Tr. 11/23/93 at 212, 221-22, 243, Duncan.) On cross-examination, Duncan testified that this distinction between actives and retirees did not come from any written document but rather was policy formulated by him and Lyng, (Tr. 11/23/93 at 243-45, Duncan), and never recorded in a written document.

The court finds that those responsible for ERISA compliance were delinquent in failing to amend the SPD to reflect the lifetime amendment.[31]

58. The 1977 SPD was the formal SPD required under ERISA, (D.Exh. 18 at 028370). It contained a standard ROR which read in relevant part: "Sperry Rand Corporation hopes to be able to continue the Plan indefinitely, but reserves the right to modify or discontinue it *at any time.*" (D.Exh. 18 at 028384 (emphasis added).)

59. Vickers apparently ceased distributing the 1977 SPD after March 1, 1979. (Tr. 11/23/93 at 216-17, 236, 239-40, Duncan; Tr. 11/24/93 at 148-150, Lyng.) However, all Vickers retirees that are class members of this litigation would have been provided with the 1977 SPD at some time during their active employment. This would be true even if an employee was last provided with the SPD in 1977, because an employee was only eligible to receive retiree medical benefits under the 1979-80 amendments if he or she had *ten* years of service. (P.Exh. 119 at PL01731.) Thus, the court finds that there are no plaintiffs who can claim complete lack of notice of the ROR.

d. Sperry New Holland

60. Sperry New Holland ("New Holland") manufactured specialized farm machinery and was sold to Ford Motor Company effective March 27, 1986. (P-T Stip. at ¶ 3c.)

61. Until 1979, Sperry New Holland, like its Vickers counterpart, provided retiree medical benefits through age 65 only. Effective January 1, 1979, New Holland decided to extend coverage for the retirees' lifetime. (P.Exh. 89; Tr. 1/13/94 at 9, Losey.) In addition to applying this benefit prospectively, the

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31. Although the failure to amend the SPD to formally incorporate the change from benefits ending at age 65 to death may provide additional support for the Vickers group of retirees in their claim for BOFD, it does not alter the contractual analysis under 29 U.S.C. § 1132. "[F]ailure to amend the SPD [does not] undermine the validity, or binding effect, of the document." *DeGrooth v. General Dynamics Corp.*, 837 F. Supp. 485, 488 (D. Conn. 1993).

new coverage also applied to those "retirees over age 65 whose coverage had previously terminated." (P.Exh. 89 at 3.[32])

62. This decision to extend benefits for life was quite an important and emotional event at New Holland. (Tr. 1/13/94 at 32, Losey.) Losey, then New Holland's Vice-President for Personnel,[33] invited all retirees and their spouses to a meeting at a local high school to announce and explain the change to "lifetime" coverage. (Tr. 1/13/94 at 32, Losey.) The ROR was not mentioned or emphasized to the audience.

63. In 1980, New Holland issued a new SPD as part of a document titled "Family Security Program." (D.Exh. 31.) The 1980 SPD was meant in part to memorialize the 1979 changes. (Stip. for Sperry New Holland at ¶ 50, filed June 3, 1994 [hereinafter Stip. for New Holland]). Although New Holland inadvertently failed to include the lifetime language in this document, the parties have stipulated that the 1980 SPD was not intended to revoke the 1979 lifetime extension of medical benefits. (Stip. for New Holland at ¶ 52.)

64. The 1980 SPD, like its predecessors, contained a ROR that provided in relevant part: "Sperry Corporation hopes to be able to continue the Plans indefinitely, but reserves the right to modify or discontinue them *at any time*." (D.Exh. 31 at 030506 (emphasis added).)

65. Losey participated in the drafting of the New Holland 1980 SPD. (Tr. 1/13/94 at 8, 11, Losey.) He testified that his understanding of the ROR set forth in that document was "to say to employees that it was our intent to establish those benefits and continue them to the best of our ability. . . . If that could not be done, changes may be required." (Tr. 1/13/94 at 11, Losey.)

66. Although the SPD contained a ROR, the other documents sent out to employees discussing the lifetime benefit did

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32. This document does not have any Bates numbers. The reference to page 3 is to the internal page numbering of the document itself.

33. A full description of Losey's background is provided in FOF 27.

not mention the company's right to terminate the plan. (*See, e.g.*, P.Exh. 98; Tr. 1/12/94 at 151-52, Brubaker.) For example, New Holland developed a comprehensive retirement packet for employees considering retirement. That packet described all of the benefits, not just medical benefits, that the employee would receive upon retirement. (P.Exh. 98.) The first item discussed in this packet is "Health Insurance." It provides in relevant part:

> *Under the Family Security Program,* the hospital/surgical/medical and major medical benefits are *continued for life* to all retirees, as well as eligible dependents . . . . Coverage will not be continued to the spouse of a retiree that marries or remarries after retirement.

(P.Exh. 98 at 066853 (emphasis added).) There was no qualification in the packet suggesting that "for life" was subject to the ROR. (*see* P.Exh. 98; Tr. 1/13/94 at 35, Losey.) However, the sentence discussing the lifetime coverage begins with the words "*Under* the Family Security Program . . ." which is the name of the SPD, the document that contains the ROR. (Tr. 1/13/94 at 79-80, Losey.)

67. Losey explained that at the time this packet was produced, back in 1980-81, no one was thinking about terminating the plan — in fact, it had just come into being, and therefore the fact that the ROR was not repeated in the informal communications did not surprise him.[34] (Tr. 1/13/94 at 41, 45-

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34. Although the retirement packet section on health benefits did not mention the company's power to terminate the plan, interestingly enough, the retirement packet did qualify the section on the "Christmas Bonus Program" and specifically alert the employee that the Christmas bonus was not necessarily guaranteed. (P.Exh. 98 at 066856.)

The Christmas bonus had a long and emotional history at New Holland that dated back to 1940. (Tr. 1/13/94 at 63, Losey.) As Losey explained it: "[W]hen we talked about the Christmas bonus, in order to reinforce the concept that this was discretionary, we always used that word. Always used it. . . . [t]his was intended to be a gift in the tradition that George Delp went to the bank and got silver dollars. [It wasn't always paid in silver dollars because] . . . we finally ran out of silver dollars, and a lot of these silver dollars became extremely valuable. . . . [W]e had hundreds of thousands of silver dollars at a point in time. And the year I came in 1964, the silver

46, Losey.) Furthermore, the controlling document was always the SPD and that document contained a ROR. (Tr. 1/13/94 at 47, Losey.)

68. Many New Holland employees retired, as did retirees from the other divisions, with the understanding that their medical benefits were for life and could not be taken away. (*See, e.g.*, Tr. 1/5/94, Daugherty, Keister, Sheaffer.) For example, Robert Daugherty ("Daugherty") retired in 1981, after almost thirty years with New Holland, under the terms of the 1979 plan. (Tr. 1/5/94 at 37, Daugherty.) Prior to his retirement, Daugherty attended a series of meetings conducted by the company in which his medical benefits were explained as continuing for life at no cost. (Tr. 1/5/94 at 38-39, Daugherty.) There was no mention during these meetings of the company's reserved right to terminate the plan. (Tr. 1/5/94 at 40, Daugherty.) Daugherty also attended an exit interview conducted by Jay Brubaker ("Brubaker").[35]

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dollars, we only gave ten because the supply was getting short. And then we changed it, we'd give one a year and we would encase them, and we would go through them to make sure that we weren't giving out a silver dollar worth $200. And George Delp would stand there, and I'm not kidding you, and hand out every one along with Matt McCarty, the president, or Ken Donaldson and myself. And we would stand there for the night shift till midnight handing out this stuff. And it was a very emotional thing, and it was to be discretionary. . . . You'd have to experience it, I'm telling you." (Tr. 1/13/94 at 65-66, Losey.)

35. Brubaker was employed in various benefits-related positions with Sperry and Unisys from 1966 until his retirement in 1991. Brubaker was the Employee Benefits Manager for Sperry New Holland from 1972 until 1983, when he was named Director of Personnel Administration. In 1984, Brubaker became the Director of Employee Benefits for Sperry Univac, a position he held until 1986, when he was named Director of Welfare Plans Financial Administration for Unisys. He served in this position until his retirement. Following his retirement, Brubaker was retained as a consultant to Unisys to provide services unrelated to this litigation. After this litigation was initiated, Brubaker's responsibilities were expanded to include the gathering and organization of documents related to the litigation. Brubaker is a class member. Brubaker testified at trial on January 12, 1994. Portions of his deposition testimony were designated and counter-designated by the parties and marked as Plaintiffs' Exhibit 570. (P-T Stip. at ¶ 82.)

Brubaker similarly told Daugherty that he and his wife would have medical coverage for life, without mentioning the ROR. (Tr. 1/5/94 at 37, 43, Daugherty.)

69. This general perception, on the part of employees, that the plan would never be terminated did not surprise Losey, who testified in relevant part:

> Q: [I]sn't it fair to say that you knew that people who were retiring thought their medical benefits would not be changed? They might be improved but they wouldn't be lessened?
>
> A: To answer your question, if I were asked what was the retiree opinion, I would say yes, the retirees opinion, when they retired they were going to get this postretirement medical and they had a high level of assurance it would continue, yes.

(Tr. 1/13/94 at 57, Losey.)

e. Sperry Flight Systems

70. Sperry Flight Systems/Aerospace and Marine ("Flight Systems"), supplied airborne navigation, guidance and control systems for military and commercial aircraft, and was sold to Honeywell Corporation effective November 12, 1986. (P-T Stip. at ¶ 3d.)

71. Flight Systems first initiated lifetime benefits for retirees in 1977. (Tr. 11/24/93 at 63, Rohs.) Accordingly, the 1977 SPD for Flight Systems spoke of retirement medical benefits continuing "on a contributory basis for the rest of your life."[36] (P.Exh. 662 at 029801.) In 1980, Lowell D. Rohs ("Rohs"),[37]

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36. As the Findings illustrate, some divisions provided lifetime coverage at no cost, while other divisions provided it on a contributory basis. This distinction is immaterial, however, for resolution of the primary issue before the court, namely, whether or not, "vested" benefits were created through the use of lifetime language.

37. Rohs worked for the Sperry Flight Systems Division (formerly the Sperry Phoenix Company) from 1961 to approximately 1988. He did not retire under any of the Sperry plans at issue in this litigation. In 1976, Rohs became Director of Personnel of Sperry Flight Systems. In 1977, he became

Vice-President for Personnel & Administration of Flight Systems, announced that this coverage was being extended to spouses "until the spouse dies or remarries." (P.Exh. 191; Tr. 11/24/93 at 84, Rohs.)

72. The 1977 SPD had a ROR, listed under the section "Plan Continuance" and appearing at the end of the document, which provided in relevant part: "Sperry Rand Corporation hopes to be able to continue this Plan indefinitely, but reserves the right to modify or discontinue it *at any time*." (P.Exh. 662 at 029802 (emphasis added).) In this document, the ROR appears on the page following the lifetime language. (*See* P.Exh. 662 at 029801, 029802.)[38]

73. Even though the SPD explicitly contained a ROR that on its face did not distinguish between actives and retirees, (Tr. 11/24/93 at 96-97, Rohs), Rohs believed that the ROR only applied to actives. (Tr. 11/24/93 at 87, Rohs.) His understanding primarily came from his participation in the Personnel Council[39] and the fact that in all of the discussions this group of high level human resources/personnel officers had, no one ever clarified or discussed that lifetime benefits were subject to the ROR; the topic simply never surfaced. (Tr. 11/24/93 at 96, Rohs.) Yet, Rohs said he knew that the "lifetime" benefit could be taken away from an active employee:

> [I] don't recall the reservation of rights terminology being used in that council meeting. When I looked at the res-

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Vice-President of Personnel and Administration for the Division and held that position until the sale of the Flight Systems Division to Honeywell in November 1987. Rohs was also a member of the Sperry Corporation Personnel Council. Rohs testified on November 24, 1993. (P-T Stip. at ¶ 60.)

38. In addition, this SPD had a separate section titled "When Your Insurance Terminates," which provided in relevant part: "Your insurance under this Plan terminates: . . . when the Plan terminates." (P.Exh. 662 at 029800.)

39. The Personnel Council consisted of the vice-presidents of human resources/personnel from Sperry's operating divisions and its corporate vice-president of human resources/personnel, who met periodically to discuss and exchange information regarding personnel and employee benefits issues.

> ervation of rights clause, I always interpreted it very clearly that that was a change to a plan for an active employee. That the retirees were locked in, were lifetime security.

(Tr. 11/24/93 at 87, Rohs.)[40]

74. As a result of this understanding, Rohs instructed his staff to answer questions from potential retirees without reference to the ROR:

> Q: And did you also in your position as the vice president of personnel, did you also have discussions with your staff concerning information they should give to people who were contemplating retirement?
>
> A: We prepared for that in advance of the employee meetings. We went through conceivable questions, and I would instruct the staff the interpretation of that, as I did on post-retirement or any other thing. . . .
>
> Q: And over this period of time from 1976 when you became the director of personnel, and 1978 when you became the vice president, all the way up until the time of the acquisition — merger, what were you telling your staff as to the information they should give to people contemplating retirement, with respect to the duration and commitment of the company to provide these health care benefits on into the future?
>
> *A: That it was a lifetime financial security that they could depend on.*
>
> Q: In your opinion, what if any was the applicability of this reservation of rights language for this commitment for lifetime health care benefits?
>
> A: It was always clear to me that that applied to a active program. In other words, that we were free to change or

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40. On cross examination, Rohs said that although he testified on direct examination that his understanding came from his years on the Personnel Council, the Council never addressed the relationship between the ROR and the lifetime language. (Tr. 11/24/93 at 96-97, Rohs.)

terminate any active or benefit plan for active employees. . . . *But once they had the left the corporation and been assured by us that this was a lifetime provision, they should not have to worry about that.*

(Tr. 11/24/93 at 89-91, Rohs (emphasis added).)

75. Several Flight Systems retirees testified that they understood that their benefits would last for their lifetime, unchanged.[41] (*See, e.g.*, P.Exh. 814 at 12-13, Goedecke Dep.; P.Exh. 812, at 20-21, Fink Dep.; P.Exh. 820 at 9-10, Streich Dep.[42])

f. Sperry Division

76. Sperry Division/Electronic Systems ("Sperry Division") was a provider of defense systems for air, sea, undersea and land applications, including navigational systems, guidance and control systems, and radar and fire control systems. (P-T Stip. at ¶ 3e.)

77. Within the Sperry Division, Sperry Gyroscope began providing for lifetime post-retirement medical coverage as early as 1969. (P.Exh. 680 at 029089.) The 1969 booklet describing the benefits indicated that hospital and surgical benefits (but not major medical) were included.[43]

78. In the 1977 and 1978 SPDs issued pursuant to ERISA, the section on retirement benefits described the benefits as being continued "at no cost" and "for life." (P.Exh. 678 at 029042; P.Exh. 676 at 028997.)

79. While most of the ROR clauses which were encountered in this litigation do not explicitly specify that they apply to both actives and retirees, the ROR in the 1977 and 1978

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41. Some of these individuals retired under the pre-Medflex plan, while others retired under Medflex. However, since both SPDs contained lifetime language and a ROR clause which provided that the company could end the plan "at any time," the court finds no distinction material to this litigation.

42. In an effort to expedite the proceedings, these depositions were submitted to the court as part of the record, rather than having each retiree testify orally.

43. Until 1979, major medical benefits were provided until age 65 only.

Sperry Gyroscope SPD made this clear, which makes plaintiffs argument that the ROR only applied to actives almost insurmountable, at least as to those individuals covered by this language.[44] This ROR provided in relevant part:

> Sperry Rand Corporation hopes to be able to continue this Plan for eligible *and retired employees* indefinitely, but reserves the right to modify or discontinue it at any time.

(P.Exh. 678 at 029055; P.Exh. 676 at 029010 (emphasis added).)

80. In 1979, Sperry Division extended the lifetime coverage to include major medical benefits, as well as to include retirees' spouses until remarriage. (P.Exh. 143 at 220418.[45]) It later issued SPDs incorporating these developments. (P.Exh. 674 at 045024; P.Exh. 675 at 220523.) These SPDs also contained a ROR.[46]

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44. Plaintiffs argue in the alternative that even if the ROR applies to both actives and retirees, they should still prevail because the use of the word "lifetime" was enough to vest the benefits.

45. The letter announcing these improvements was dated June 29, 1979, and signed by Salvatore Conigliaro, Sperry Division's President at that time. It stated in relevant part:

> To Members of the Sperry Rand Retirement Program:
>
> I am pleased to announce that the Corporate Board of Directors and Sperry Rand Retirement Committee have made a number of improvements in our retirement program. . . .
>
> Until these changes are incorporated into new booklets, I suggest that you keep this announcement with your important papers . . .
>
> Now, the basic hospital-surgical-medical *and* major medical coverages *will continue for your life and the life of your spouse . . . . This coverage is provided at no cost to you.*

(P.Exh. 143 at 220414, 220418 (emphasis added).)

46. Plaintiffs point out that the ROR clause that appears in the 1981 and 1982 Sperry Gyroscope SPDs differed from the other RORs in that it spoke of the "right to amend or end [the plan] at [the Company's] discretion *and pursuant to any collective bargaining agreement.*" (*See* Sperry Plaintiffs' Proposed FOF at 8, n.2 (emphasis added).) Plaintiffs seem to suggest that this "qualifier," as they call it, has some legal significance for resolution of the issues in this litigation. However, plaintiffs failed to

81. One of the individuals responsible for the pre-Medflex plans at the Sperry Division was Harold Dahl ("Dahl"). (P.Exh. 631 at 75-76, Dahl Dep.) Dahl worked for Sperry Corporation from 1942 through 1986 and was a member of the Corporate Personnel Council. At the time of his retirement, Dahl was Vice-President of Personnel for the Sperry Division. Dahl testified by deposition on November 23, 1993. (P-T Stip. at ¶ 16.)

82. Like many other members of management who testified, Dahl believed that the ROR only applied to actives and was inapplicable once an individual retired, even though some of the RORs in the Sperry Division SPDs explicitly mentioned retired employees.[47] (P.Exh. 631 at 50-51, Dahl Dep.) Dahl communicated his understanding of the benefits to his staff, (P.Exh. 631 at 39-42, Dahl Dep.), some of whom in turn counseled employees that their benefits would be "for life" without ever qualifying that information by mentioning the ROR. (*See, e.g.*, Tr. 1/4/94 at 9-10, Fudge; Tr. 1/5/94 at 114-16, Saville.)

g. Sperry Remington and Sperry Research Center

83. Because the plaintiffs did not present any witnesses from these business units and did not mention them in their Proposed Findings, the court does not make any special findings as to these groups other than to cite the documents which both parties agree control the respective groups.

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present any evidence that the clauses were intended to mean something different from what they say — that the Company could amend or terminate the plan "at its discretion." (P.Exh. 674 at 045026; P.Exh. 675 at 220524.) Thus, the court finds that the additional language about the collective bargaining agreement is irrelevant for purposes of this litigation.

47. Dahl testified that he thought the ROR only applied to actives and to *future* retirees, meaning those who had not yet retired. (P.Exh. 631 at 50, Dahl Dep.)

84. The controlling documents for Sperry Remington Electric Shaver are D. Exh. 15, 16 and 17.[48] (Parties' Joint Stip. at 3.)

85. The controlling documents for Sperry Research Center are D.Exh. 36 and 37. (Parties' Joint Stip. at 5.)

h. Sperry Executive Offices[49]

86. The Executive Medical Plan ("Executive Plan") was first offered to Sperry's active executives in 1976 as a supplement to Sperry's existing plans. (Tr. 1/12/94 at 37-38, Loughlin; D.Exh. 114 at 098379-81.) Coverage under the 1976 Executive Plan ceased once the executive retired thus no lifetime language was used. (D.Exh. 114 at 098381.) The 1976 Executive Plan contained a ROR clause which read: "The Company reserves the right to amend or terminate this Plan at any time in its sole discretion." (D.Exh. 114 at 098379.)

87. In 1980, Sperry amended its Executive Plan to extend medical benefits to eligible executives until their death and the death of their spouses. (D.Exh. 114 at 098397; P.Exh. 196.)

88. The Board resolution described the new benefits as "lifetime" coverage. (D.Exh. 114 at 098384.) The Plan similarly described the benefits through use of the words "lifetime," and when referring to the spouse described the benefit as lasting for "as long as she lives." (D.Exh. 114 at 098398, 098400.)

89. The final page of the 1980 Plan contained a section titled "Amendment," (D.Exh. 114 at 098402), which provided:

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48. In a letter dated May 23, 1994, the plaintiffs advised the court that they are not asserting any claims as to the Sperry Remington Electric Shaver group.

49. The parties have agreed, and confirmed in a letter to the court dated May 23, 1994, that the claims of those who retired under an Executive Plan are not encompassed within this lawsuit, although they may be pursued at a later time. However, the Executive Plan documents were introduced into evidence for the purpose of shedding light on whether or not the company meant to "vest" benefits under the rank and file plans through the use of the word lifetime.

"The Company reserves the right to amend or terminate this Plan *at any time* in its sole discretion." (*Id.* (emphasis added).)

90. Thus, after the 1980 amendment was effective, the Executive Plan contained lifetime language and a ROR which were virtually identical to the language in the Company's rank and file plans.[50]

91. Nonetheless, in 1982, the Executive Plan was again amended, this time to explicitly provide for the "vesting" of medical benefits. The Board resolution from the March 4, 1982 meeting provides in relevant part:

> It was proposed that the Corporation's Executive Medical Plan be amended to provide *for vesting* of Eligible Executives. *The amendment would irrevocably commit the Corporation to pay the benefits that the Plan provides.* However, vesting would be contingent on an Eligible Executive's continuing to be employed by the Corporation for one year.

(D.Exh. 114 at 098414 (emphasis added).) The resolution, the entire text of which can be found in D.Exh. 114 at 098414-098415, was unanimously adopted.

92. The ROR in the actual Plan document was then amended to incorporate this change so that after March, 1982, it provided:

> The Company reserves the right to amend or terminate this Plan at any time at its sole discretion, *except that no amendment or termination of the Plan shall reduce or*

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50. As the Findings illustrate, not all division Plans contained the exact same ROR language. Similarly, the ROR in the Executive Plan differs slightly from the rank and file plans. However, any differences are immaterial for purposes of the issues before this court.

Additionally, the lifetime language in the Executive Plan was not identical to that of the rank and file plans. Whereas the rank and file plans explicitly spoke of coverage continuing "for your life," the Executive Plan spoke of the benefits being "continued into retirement" and the spouse's benefits lasting for "as long as she lives." (D.Exh. 114 at 098400.)

impair the benefits payable to an Active Eligible or a Retired Eligible Executive, or to his spouse or dependents, if any.

(D.Exh. 114 at 098429 (emphasis added).)

93. It seems that the decision to add the word "vested" resulted, at least in part, from prompting by John Huston ("Huston"), then Sperry's General Counsel. (P.Exh. 596A at 99-105, Hirschberg Dep.) Apparently, Huston read the plan, and as a participant under it and a lawyer, he told Thomas Hirschberg ("Hirschberg") that he thought the plan would be "stronger" if the word "vested" was added. (P.Exh. 596A at 99-100, 104-105, Hirschberg Dep.)

94. Hirschberg was responsible for implementing amendments to the Executive Plan. (P.Exh. 596A at 100, 119, Hirschberg Dep.) Hirschberg testified that he told Huston that the change was unnecessary because the plan already provided for lifetime coverage which Hirschberg testified he believed was sufficient to, in essence, "vest" benefits for retirees.[51] (P.Exh. 596A at 20-23, 100-101, 105-106, Hirschberg Dep.) Obviously, however, Hirschberg complied because the word "vested" was added formally to the plan.

95. Hirschberg worked for Sperry, and later Unisys, from 1953 to 1987, and retired in 1987 as a regular retiree under the Medflex and Executive Medical Plans. At the time of his retirement, Hirschberg held the position of Chairman, Sperry Capital Management Corporation. Prior to that position, Hirschberg held the positions of Manager of Communications,

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51. Hirschberg, like most of the plaintiffs' witnesses, testified that he believed the ROR, both in the rank and file plans and in the Executive Plans, applied differently to actives versus retirees; as to actives, Hirschberg believed the ROR was enforceable but once an individual retired, the company could not change or take away the benefits. (P.Exh. 596A at 20-24, Hirschberg.)

Similarly, Sweeten testified that he believed the modifications to the Executive Plan made it "more clear" but beyond that did not change the Company's intent regarding medical benefits. (P.Exh. 589A at 93-94, Sweeten Dep.)

Department of Insurance; Director of Employee Benefits; Staff Vice-President for Insurance (including Benefits); Vice-President, Insurance (including Benefits); and Vice-President, Finance. Hirschberg was a member of the Sperry Corporation Employee Benefits Executive Committee from 1975 to 1986. Hirschberg testified by video-taped deposition on November 23, 1993, and his discovery deposition was designated and counter-designated. (P-T Stip. at ¶ 36.)

96. The Executive Plan was the only SPD to use the word "vested" to describe medical benefits.[52] (P.Exh. 596A at 100-101, Hirschberg Dep.) The only other time the word "vested" is used in any of the SPDs is to describe benefits under the Sperry Pension Plan.

97. The word "vested" has special meaning under ERISA, a meaning that at least some of Sperry's officers clearly recognized. For instance, J. Paul Lyet ("Lyet"), Sperry's CEO at the time,[53] wrote a letter to Sweeten, one of the beneficiaries under the Executive Plan, explaining the purpose of adding the vesting provision:

> I am pleased to inform you that, at the March 4, 1982 meeting of the Board of Directors, the Executive Medical Plan was amended to provide you with a vested (nonforfeitable) right to coverage under . . . the Executive Medical Plan . . . *If you recall, under the Plan as previously written, the Company reserved the right to modify or terminate it at any time. The inclusion of these changes, according to counsel, precludes such change which would adversely affect your right to benefits.*

(P.Exh. 590 (emphasis added).)

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52. It should be noted that this plan was terminated along with the others, even in the face of the "vested" language. (Tr. 4/18/94 at 117.) However, as stated *supra*, the Executive Plan is not at issue in this lawsuit and accordingly the court expresses no opinion on the merits of any claims which may be brought by this group.

53. Lyet is since deceased.

3. The Applicability of the ROR to Retirees

98. As some of the previous Findings have illustrated, there was a general understanding, on the part of some high ranking officers and lower-level managers and benefits counselors, that the ROR only applied to active employees. The court finds, however, that not a single governing document exists which makes this distinction. In fact, Hirschberg, who testified that he helped to create the policy of restricting the ROR to actives (P.Exh. 596A at 34, Hirschberg Dep.), admitted that this policy was never committed to writing, (P.Exh. 596A at 40, 106, Hirschberg Dep.), despite Sperry's admitted practice of maintaining written corporate policies. (P.Exh. 589A at 47, Sweeten.)

99. There are no Board minutes which reflect this policy of limiting the ROR to actives, although Board minutes and a resolution exist from when the "vesting" language was added to the Executive Plan.

100. The policy of limiting the ROR apparently also never surfaced at the Personnel Council meetings where employee benefits issues regularly were discussed. (P.Exh. 631 at 65-66, Dahl Dep.; P.Exh. 589A at 78, Sweeten Dep.; Tr. 1/12/94 at 31, Loughlin.)

101. John Loughlin ("Loughlin") was the individual responsible for benefit plan design and the actual drafting of the SPDs throughout the 1980s. (P.Exh. 596A at 33, 89-94, Hirschberg Dep.) Loughlin testified that neither Hirschberg nor anyone else ever told him that the ROR was limited to active employees. (Tr. 1/12/94 at 26-29, 32, 56, Loughlin; P.Exh. 596A at 89-92, Hirschberg Dep.)

102. Loughlin is the current Staff Vice-President of Benefits Financial Administration for Unisys, a position he has held since 1987. Loughlin was Staff Vice-President, Employee Benefits, from 1984-1987, and Director of U.S. Employee Benefits, from 1979 to 1984. Loughlin also served as a non-member officer of the Sperry Corporation Employee Benefits Committee from 1983-1986. Loughlin testified at trial on January 12, 1994 and his two-volume deposition was submitted by the parties into evidence. (P-T Stip. at ¶ 84.)

103. Loughlin testified that he never intended nor understood that the ROR was to be limited to actives. (Tr. 1/12/94 at 32-37, 48-49, Loughlin.) Vincent McLean ("McLean"), who was Sperry's Chief Financial Officer from 1983-1986, shared this view. (Tr. 1/13/94 at 93, 96, McLean.)

104. Loughlin testified that he was involved personally in the decision to include the ROR in the SPDs. (Tr. 1/12/94 at 31, Loughlin.) By including the ROR, Loughlin testified, it was his intent to "be assured that the corporation does not make an open end commitment to some future event that may require them [sic] to change it. I viewed the reservation of rights clause as a standard practice not only within Sperry, or Burroughs, or Unisys Corporation, but as standard practice within corporate America to include a reservation of rights clause." (*Id.*)

B. CONCLUSIONS OF LAW/ANALYSIS

1. The Issue of Subclasses

At the outset, the parties disagree on whether the Sperry class should be subdivided. The plaintiffs argue that all Sperry regular retirees, no matter what division they retired from, should be dealt with as a single unit.[54] As plaintiffs correctly point out in their brief, all of the Sperry divisions conveyed the same message that post-retirement medical benefits would be provided for life. Although some divisions intro-

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54. Although plaintiffs' position is that all Sperry retirees should be treated alike, counsel for plaintiffs in *McMahon v. Unisys*, a sub-group of the Sperry plaintiff class, filed their own motion asking the court to certify Vickers as a separate subclass.

Additionally, following closing arguments, plaintiffs made a belated request in an attempt to distinguish a small group of class members from the class of Sperry regular retirees. These were individuals who retired under a voluntary reduction in force program ("VRIF"), not a VERIP. (*See* Supplemental Briefs, filed May 27, 1994.) The court allowed the parties to take some sample depositions and to brief the issue, in order to discover whether this small group did have any "special" claims. The court, however, finds that the VRIF individuals are in no different position than any of the other Sperry plaintiffs. Rather, any differences that do exist only go to bolster their BOFD claim. *See* Section IIB3, *infra*.

duced the language earlier than others, the timing of introduction is immaterial for resolution of the issues presented to the court. Similarly, Unisys offered the exact same defense for all Sperry divisions, namely that the lifetime language is subject to the ROR. Although some ROR clauses are more detailed than others, each clause provided that the Company could terminate the plan "at any time" or "at the company's discretion."

Defendant's argument that the court should create a separate class for each of the business units, as well as for Medflex, apparently stems from its concern that the witnesses testified about the circumstances in their own divisions. The court appreciates that the evidence presented to substantiate a BOFD claim, such as potentially misleading communications, was often specific to each division, and in many cases, specific to the individual. Therefore, the court will revisit the subclass issue during the BOFD discussion. However, with respect to the breach of contract claim brought pursuant to 29 U.S.C. § 1132(a)(1)(B), the material facts are common to all of the divisions and the court sees no reason to fragment the class into subclasses. *See generally Sprague v. General Motors Corp.*, 843 F. Supp. 266, 272 (E.D. Mich. 1994) (in case involving issue of whether plaintiffs were entitled to vested health benefits, court found that where plaintiffs' claims and defendant's defense is uniform, class is properly certified); *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 593-94 (E.D. Wa. 1986) (certifying class in similar factual situation despite objection that different groups of employees relied on different documents as basis for their claims.)

2. The Breach of Contract Claim

Plaintiffs' first and primary claim is for denial of benefits under the plans. *See* 29 U.S.C. § 1132(a)(1)(B). Plaintiffs argue that the plan documents entitle them to vested medical benefits and thus the defendant's termination of those benefits violates ERISA. Plaintiffs arrive at this conclusion by two interrelated routes. First, plaintiffs argue that having lifetime language and a ROR makes the document internally inconsis-

tent and therefore ambiguous under a *Mellon Bank*[55] analysis. In fact, this is precisely what the court held at the summary judgment stage. *In re Unisys,* 837 F. Supp. at 679. Now that the court has heard the extrinsic evidence, plaintiffs argue that the court should conclude that lifetime meant just that — for life. Alternatively, plaintiffs say, even if the court were to find that "lifetime" is not, in essence, synonymous with "vested," then the evidence shows that the defendants intended that the ROR only apply to active employees and not to retirees, and thus the company never intended to reserve its right to terminate the plans as far as retirees are concerned.

a. General ERISA & Contract Principles

ERISA defines and regulates two types of employee benefit plans: pension plans and welfare plans. *In re Unisys,* 837 F. Supp. at 673 (citation omitted). A benefit plan that provides medical insurance for its participants is considered a welfare plan. 29 U.S.C. § 1002(1). The parties agree, and the court holds, that the plans at issue are welfare plans.

ERISA does not require an employer to create an employee welfare plan. *Smith v. Hartford Ins. Group,* 6 F.3d 131, 136 (3d Cir. 1993); *Hamilton v. Air Jamaica Ltd.,* 945 F.2d 74, 78 (3d Cir. 1991) (citation omitted), *cert. denied,* 112 S. Ct. 1479 (1992). Moreover, once an employer decides to provide such a plan, ERISA does not mandate the inclusion of any particular set of benefits. *Hamilton,* 945 F.2d at 78 (citation omitted). As the Court of Appeals for the Third Circuit noted in *Hamilton*: " 'ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans.' " *Id.* (quoting *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S. Ct. 183, 88 L. Ed. 2d 152 (1985)).

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55. *Mellon Bank* is a leading case in this Circuit on the issue of how a contract, and any alleged ambiguities, should be construed. *Mellon Bank, N.A. v. Aetna Business Credit,* 619 F.2d 1001 (3d Cir. 1980).

Although ERISA does not require an employer to provide a welfare plan, it regulates the welfare plans of employers who choose to do so. Under ERISA, welfare benefits do not vest automatically. *Smith*, 6 F.3d at 136; *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 95 (3d Cir. 1992) (citation omitted). Thus, in general, an employer may terminate a welfare plan "at will" so long as the procedure followed is consistent with the plan. *Deibler v. United Food and Commercial Workers' Local Union 23,* 973 F.2d 206, 210 (3d Cir. 1992) (citation omitted). However, in some situations welfare plans may provide for or imply a vested benefit. *Alexander,* 967 F.2d at 95 (citation omitted). *Accord Schoonejongen v. Curtiss-Wright*, 18 F.3d 1034, 1042 (3d Cir. 1994), *petition for cert. filed* (U.S. June 1, 1994) (No. 93-1935) [hereinafter *Curtiss-Wright*]; *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied,* 489 U.S. 1051 (1989); *Murphy v. Keystone Steel & Wire Co.*, No. 93-1247, 1994 WL 172252, *4-5 (C.D. Ill. May 2, 1994); *Sprague*, 843 F. Supp. at 299.

In analyzing the provisions of a plan document or SPD under ERISA,[56] courts consistently apply general contract principles. *See, e.g., DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812, 815 (8th Cir. 1988) ("Although the benefits in this case were unilaterally provided by [the employer], we believe that ordinary contract construction principles should be used to determine if the benefits are vested."), *vacated and remanded on other grounds*, 489 U.S. 1049 (1989). For instance, courts have adopted into the ERISA context the rule that the document must be interpreted as an integrated whole.

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56. In this case, the parties agree that the SPD is the controlling document that the court must interpret. (Tr. 4/18/94 at 7.) The following exchange between the court and the parties took place at closing arguments:

> Court: [C]an we clear up for the record that you both agree that it's the summary plan documents that control here, because there doesn't seem to be many, if any, full plan documents.
>
> Counsel for Plaintiff: I think that's a fair statement, your Honor.
>
> Counsel for Defendant: Yes . . . .

(Tr. 4/18/94 at 7.)

See, e.g., Wise v. El Paso Natural Gas Co., 986 F.2d 929, 939 (5th Cir.) (" '[T]he summary plan description must be read as a whole. It would be error to attend only to one paragraph, page, or portion of the summary.' ") (citation omitted), *cert. denied*, 114 S. Ct. 196 (1993); *Alexander*, 967 F.2d at 93 ("We also note that ERISA plans, like contracts, are to be construed as a whole) (citation omitted); *Anderson*, 836 F.2d at 1519 (" '[T]he plan cannot be interpreted to provide vested rights for prior retirees in one provision and to take such rights away in another.' ") (quoting *Anderson v. Alpha Portland Indus., Inc.*, 647 F. Supp. 1109, 1127 (E.D. Mo. 1986)); *Allen v. Atlantic Richfield Retirement Plan*, 480 F. Supp. 848, 850 (E.D. Pa. 1979) ("[O]ne provision of a writing may not be read in isolation from other provisions; the writing must be interpreted as a whole.") (citation omitted), *aff'd mem.*, 633 F.2d 209 (3d Cir. 1980).

Plaintiffs spent considerable time arguing both orally and in their briefs that the court must apply the doctrine of *contra proferentem* in this case. Although the court recognizes the applicability of the doctrine to ERISA cases, *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257-58 (3d Cir. 1993), construing ambiguities against the drafter should be the last step of contract interpretation, not the first step. *DeGeare*, 837 F.2d at 816. *Accord Smith*, 6 F.3d at 140, n.9. As the Court of Appeals for the Eighth Circuit aptly said:

> Using plaintiffs' analysis, the instant we determine that the plan documents are ambiguous, they win. We disagree. Ambiguities should be construed against the drafter only if after application of ordinary rules of construction and consideration of extrinsic evidence, the ambiguities remain. If we can ascertain the meaning of the language using ordinary principles of interpretation, there is no need to construe it in any other manner.

DeGeare, 837 F.2d at 816. Thus, the first step is for the court to weigh the extrinsic evidence to determine whether the ambiguity remains.

b. Burden is on Plaintiff

As stated *supra,* welfare plans do not vest automatically, but an employer may create vested benefits. A plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the benefits to be vested. *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990) (citation omitted); *DeGeare,* 837 F.2d at 815; *Anderson*, 836 F.2d at 1517; *Sprague,* 843 F. Supp. at 299-300. *See also Schoonejongen v. Curtiss-Wright,* Civil No. 84-4542, *slip op.* at 2-3, (D.N.J. Oct. 4, 1990) (unpublished Bench Opinion) (Bissell, J.) ("Given the ERISA philosophy not to hastily construe a plan to create vested interest where there are none, that is in plans such as health benefit plans, the record would have to reveal by a preponderance of the evidence that in this case such benefits vested.), *aff'd,* 18 F.3d 1034 (3d Cir. 1994), *petition for cert. filed* (U.S. June 1, 1994) (No. 93-1935). As the Court of Appeals for the Eighth Circuit said:

> [I]t is especially important that plaintiffs bear the burden of proof in cases such as this where the benefits in question are unilaterally provided by the employer. Accepting plaintiffs' argument would lead to the anomalous result that [the employer] would have to prove a negative — that it did not promise lifetime benefits — everytime plaintiffs choose to file a lawsuit.

DeGeare, 837 F.2d at 815.

c. Re-evaluating the Summary Judgment Opinion in Light of *Curtiss-Wright*

At the summary judgment stage, this court held that "[b]ecause the Sperry summary plan descriptions contain promises of lifetime benefits and reservation of rights language, they are internally inconsistent." *In re Unisys,* 837 F. Supp. at 677 (footnote omitted). I found that under *Mellon Bank* this inconsistency rendered the document ambiguous and required the court to accept extrinsic evidence to clarify the ambiguity.[57]

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57. I observed that "[t]he presence of the words 'life' and 'lifetime' . . . is of particular importance. The written promise of 'lifetime benefits'

At the time of the summary judgment opinion, this court did not have the benefit of the Court of Appeals' recent decision in *Curtiss-Wright,* 18 F.3d at 1034. The *Curtiss-Wright* decision suggests that there is nothing inconsistent about having lifetime language and a ROR in the same document. *Id.* at 1042. In light of this intervening decision, I now conclude that my original analysis on this point was incorrect.

Curtiss-Wright involved a group of retirees who sued their former employer ("CW") for terminating their health insurance. When CW closed its Wood-Ridge plant, it notified retirees from that plant that they would no longer receive health benefits. In *Curtiss-Wright,* the SPDs stated in varying forms that benefits would terminate "upon death" or when "you cease to be a member of a class eligible for insurance . . . [or] upon discontinuance of the group policy." *Id.* at 1036-37. Nothing in the SPDs defined "class." *Id.* at 1037.

Some years later, CW changed the language in the SPD to provide that: "Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired." *Id.* at 1037. The Court of Appeals affirmed the district court's conclusion that this provision, allowing for termination of retiree benefits in the event of a plant closure, was an amendment of and not merely a clarification to the original plan. Because the ROR did not unambiguously reserve the right to terminate *retiree* benefits,[58] the district court held a trial to resolve the ambiguity. *Id.* at 1041. The district court held, and the Court of Appeals affirmed, that CW had reserved the right to terminate retiree benefits for some groups of retirees while continuing benefits for others, but that CW lacked a formal amendment procedure, in violation of 29 U.S.C. § 1102(b)(3), and therefore the amendment to the plan was invalid. *Id.* at 1038-1041. However, the Court of Appeals made clear that the plaintiffs

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has powerful meaning to retiring employees; a meaning that cannot be ignored as Unisys urges." *In re Unisys,* 837 F. Supp. at 678, n.13.

58. The *CW* plaintiffs argued that the ROR on its face referred only to "employees," and not to retirees. *Curtiss-Wright,* 18 F.3d at 1041.

had won a hollow victory; CW needed only to adopt an amendment procedure, amend the plan pursuant to that procedure and then terminate whatever benefits it so chose. *Id.* at 1040.

Importantly, the Court of Appeals rejected the plaintiffs' argument that the plan language, which included the words "upon death" to describe the duration of the benefit, had created any vested rights. Because the district court had found that CW reserved its right to amend or terminate the plan, that was sufficient said the Court of Appeals, even in the face of lifetime language:

> Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as CW maintained a post-retirement health insurance program, the general reserved right to amend the terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment.

Id. at 1042 (footnote omitted). This passage suggests that my initial inclination, namely that having lifetime language along with a ROR renders a document ambiguous, was mistaken.

Other courts have reached the same conclusion. In a recent case, almost directly on point, an Illinois district court held that the lifetime implication[59] was good only so long as the employer opted not to exercise its ROR, implicitly recognizing that having both in the same document does not render the document ambiguous. *Murphy, supra.* Specifically, the court held:

> [T]he 1986 Plan must be read as an integrated whole so that all of the provisions, if possible, will be given effect. In doing so, the distinction must be kept in mind between a non-terminable plan, which may or may not provide

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59. The plan document in *Murphy* did not expressly contain the words "for life." However, the plaintiffs alleged that the language "strongly suggested" lifetime benefits, *Murphy*, 1994 WL 172252, at *6, and the court analyzed the situation as if lifetime language was used.

> lifetime health care benefits to retirees and their surviving spouses and eligible dependents, and a terminable plan which may or may not provide such lifetime health care benefits. . . . In the Court's judgment, the proffered language is unambiguous: *a retiree is provided lifetime coverage and coverage continues after his death for his spouse and eligible dependents so long as the 1986 Plan has not been terminated or amended prior to the occurrence of his death.*

Murphy, 1994 WL 172252, at *7 (internal citations omitted) (emphasis added).

Similarly, in *DeGeare, supra,* the district court considered a situation in which retirees alleged that their life and health insurance benefits were to be available for life even in the face of a ROR. Although the *DeGeare* court held a trial, which suggests that the court did not find the documents unambiguous on their face,[60] the district court's decision is persuasive on this point:

> [*I*]*nconsistent provisions, such as those permitting modification of the program and those intimating benefits last for life, must be construed so as to be harmonious.* The Court finds harmonious and reasonable [the defendants'] interpretation of the written documents to provide lifetime benefits subject to [the defendants'] . . . reserved right to amend . . . .

DeGeare, 652 F. Supp. 946, 961 (E.D. Mo. 1986) (internal citations omitted) (emphasis added), *aff'd*, 837 F.2d 812 (8th Cir. 1988), *vacated and remanded on other grounds*, 489 U.S. 1049 (1989).

Finally, there is the summary judgment opinion in *Sprague v. General Motors Corp.*, 768 F. Supp. 605 (E.D. Mich. 1991), with which I initially disagreed. *In re Unisys*, 837 F. Supp. at 678. In that case, the district court faced virtually the same issues as those presented here. As to the regular

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60. It is not clear from the opinion whether either party had ever moved for summary judgment.

retirees' claims that the company had created irrevocable health benefits through their use of lifetime language, the district court granted summary judgment to the employer. The court reasoned:

> Plaintiffs argue that provisions such as these [i.e. those with lifetime language] constitute GM's agreement to provide salaried retirees, and eligible surviving spouses, with free lifetime health care coverage, and GM's agreement not to change that policy post-retirement. I do not agree. *Plaintiffs simply ignore plan provisions wherein GM unambiguously reserved its right to change the plan.*

Sprague, 768 F. Supp. at 610 (emphasis added). In light of *Curtiss-Wright*, this court can no longer justify its disagreement with *Sprague.*

d. Was there ambiguity?

In response to the court's request for supplemental briefing on the applicability of *Curtiss-Wright* to the instant action, the plaintiffs submitted a 10-page memorandum in which they argued that *Curtiss-Wright* should not foreclose the inquiry into the extrinsic evidence. Plaintiffs contend that I was correct in initially ruling that the documents were ambiguous under *Mellon Bank*, and that *Curtiss-Wright* does not alter the inquiry I need to make. Plaintiffs correctly point out that the *Curtiss-Wright* panel did not consider the specific issue of whether an unqualified statement of lifetime benefits can limit the scope of a ROR. Furthermore, plaintiffs suggest that in *Curtiss-Wright*, the district court had specifically found that the ROR in question did apply to both active employees and retirees, and that this court still must make that inquiry.

Given these concerns, and the fact that a trial was already held in this case, I will make a factual determination for the record about whether the ROR was intended to apply to the retirees' medical benefits. Based on the following analysis, I conclude that the plaintiffs did not sustain their burden in proving that their benefits were meant to be vested.

1. The Evidence Presented

In *Alexander v. Primerica, supra,* the Court of Appeals for the Third Circuit held that where there is an ambiguous ERISA plan, a court may consider, *inter alia,* the intent of the plan's sponsor, the reasonable understanding of the beneficiaries, and past practice in interpreting the plan.[61] *Alexander,* 967 F.2d at 96 (citation omitted). Accordingly, the plaintiffs presented evidence on each of these subjects.

a. Intent of Plan Sponsor

The plaintiffs attempted to demonstrate that the defendant intended for medical benefits to vest upon an individual's retirement; his or her benefits would *never* be reduced — they would continue for an employee's "lifetime" as the language in the SPD suggested. Plaintiffs argued, in essence, that when defendant used the word "lifetime," its true intent was "vested." The evidence does not support this argument. Rather, as the language of the Executive Plan reveals, when the defendant wanted to "vest" benefits, it knew how to do so. This is also evidenced by the use of the word "vested" in Sperry's pension plan.[62] *See Pierce v. Security Trust Life Ins. Co.,* 979 F.2d 23, 28 (4th Cir. 1991) (finding "significant" the

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61. In *Alexander,* the district court held that the ROR clause was unambiguous and granted summary judgment to the defendants. The Court of Appeals for the Third Circuit reversed holding that the ROR *itself* was ambiguous on its face. *Alexander,* 967 F.2d at 92.

Language in *Alexander* suggests that had the Court of Appeals been faced with the ROR in the instant case, it would have found the language to be unambiguous. In *Alexander*, the ROR was unclear when it said "in conformity with applicable legislation." *Id.* at 93. In response to plaintiffs argument that Primerica could have drafted the ROR differently, the Court of Appeals noted that had the language been written to say: "The Plan may be amended at any time . . . [t]his argument shows only that the clause, if drafted differently, would have been unambiguous." *Id.* at 93. The ROR in the instant case uses this exact language and says the Company reserves the right to amend the plan "at any time." However, in *Alexander*, the Court of Appeals was not also faced with "lifetime" language, a point I had originally accorded significant weight.

62. The court recognizes that an employer need not use the word "vested" in order to create vested benefits. *Bidlack v. Wheelabrator*, 993 F.2d 603, 607 (7th Cir.), *cert. denied*, 114 S. Ct. 291 (1993). However, in this

presence of vesting provision in pension plan description and the absence of such a provision in medical benefits description). Furthermore, the plaintiffs conceded throughout the entire trial that an active employee's benefits could always be amended or terminated even though lifetime language was similarly used to describe that benefit. This concession seems to suggest that the plaintiffs implicitly recognize that lifetime is not synonymous with vested.

Plaintiffs' other argument, and the one on which they primarily focused their attention, was that although the SPDs used lifetime language to describe the benefits for actives and retirees, Sperry had an unwritten "practice" or a "policy" that once an individual retired, his/her benefits "locked-in." Pursuant to this "lock-in" policy, the company could not reduce the medical benefits of retirees under any circumstances. Plaintiffs' argument that the ROR, which does not facially distinguish between actives and retirees,[63] applied only to actives is simply not supported by a preponderance of the evidence.

First, and perhaps most critically, not a single document corroborates the testimony that an active/retiree distinction was in force. (*See, e.g.*, P.Exh. 596A at 35, 40, Hirschberg Dep.) Plaintiffs rely on Hirschberg's testimony that he, along with Moccia, and Lyet who is now deceased, formulated this policy. (P.Exh. 596A at 34, Hirschberg Dep.) The court is not persuaded that this policy, which admittedly would saddle the corporation with a substantial obligation, was:

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case, it is highly probative that the Company specifically used "vested" in other plans.

63. As the Findings document, most of the RORs do not state to whom they apply. Rather the clauses are located at the end of the booklets and speak of the Company's right to terminate the plans period.

However, a few SPDs contain RORs which actually applied *only* to retirees. (*See, e.g.*, P.Exh. 651.) Similarly, a few SPDs had RORs that expressly referred to both eligible and "retired" employees. (*See, e.g.*, P.Exh. 658, 659, 678). These situations cast doubt on plaintiffs' assertion that Sperry had a general policy of restricting the RORs to active employees.

(1) simply created in a casual conversation (P.Exh. 596A at 35, Hirschberg Dep.[64]);

(2) never recorded in a single document (P.Exh. 596A at 35, 40, Hirschberg Dep.);

(3) apparently never formally discussed by the Board of Directors (P.Exh. 596A at 40, 42, Hirschberg Dep.); certainly no Board resolution exists confirming the creation of this policy which contrasts with the existence of a Board resolution from the decision to "vest" Executive Benefits;

(4) never discussed at the Personnel Council meetings (P.Exh. 589A at 78, Sweeten Dep.);

(5) never disclosed to shareholders (P.Exh. 596A at 42, Hirschberg Dep.);

(6) never discussed with Loughlin, the principal drafter of the ROR (Tr. 1/12/94 at 27-32, Loughlin);

(7) never incorporated into the formal SPD so that the actual plan language would make this policy clear. This is in sharp contrast to the Executive Plan where the ROR was immediately rewritten once there was a policy change to "vest" the benefits.

All of these factors militate against the idea that the Company intended to restrict the ROR to actives.

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64. Hirschberg testified as follows:

Q: Do you recall in what context it [the creation of the policy to only apply the ROR to actives] was discussed? . . . [W]as it discussed in the context of a meeting, of a telephone conversation, was it a series of discussions? How did this policy come about?

A: Well, if you want me to give you a specific date, if I recall it, it was covered in a meeting, if you will, an informal meeting with the three of us.

Q: What do you mean by an informal meeting?

A: We sat down in Moccia's office and Mr. Lyet probably came or we went to Mr. Lyet's office *and we just talked about it and said this is what we're going to do.*

(P.Exh. 596A at 35, Hirschberg Dep. (emphasis added).)

Furthermore, as other courts have recognized, a court should not infer a distinction between benefits to actives and retirees simply based on the act of retirement. Rather, courts should look for explicit evidence that such a distinction exists. This was recognized by the court in *Etherington v. Bankers Life & Cas. Co.*, 747 F. Supp. 1269 (N.D. Ill. 1990), *aff'd mem.*, 968 F.2d 1218 (7th Cir. 1992), when it said:

> In essence, plaintiffs' argument boils down to the idea that there is something magical about retiring that transforms the . . . relationship and prevents any of the kinds of future changes that are allowable in all other situations. But *Howe v. Varity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990) (citations omitted) teaches:
>
> > [T]he mere fact that employee welfare benefits continue into retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an intent to vest can be presumed from the fact that the benefits are retirement benefits. Indeed, the benefits at issue here are 'retirement benefits' in a technical sense only. Unlike pension benefits, coverage under the welfare benefit plan does not begin at an employee's retirement. Rather, as plaintiffs themselves strenuously argue, the welfare benefits simply continue when an employee retires. Nothing in the documents establishes retirement as a vesting point.
>
> *Thus, given the absence of clear language to the contrary, nothing makes [defendants'] obligations to the retiree any different from its obligations to the active employee — and a provision allowing for the termination or modification of benefits must apply in the same way to both classes of covered individuals.*

Id. at 1275-76 (emphasis added).

b. Reasonable Understanding of the Beneficiaries

Numerous retirees testified at trial that they understood that their benefits could not be reduced after retirement.

Defendant countered that any such understanding is not "reasonable" given that the SPD contained a ROR alerting them to the possibility of future changes. There is no question that the defendant routinely spoke of the medical benefits as continuing "for life." This message was conveyed time and time again through informal communications that were sent out to retirees, and by oral statements that were made to these individuals both at private exit interviews and in group retirement sessions. However, given the law in this area, we believe "reasonable understanding" must be limited to the reasonable understanding of the SPD or plan documents. The Court of Appeals for the Third Circuit has made clear that ERISA precludes informal amendments to benefit plans. *Haberern v. Kaupp Vascular Surgeons Ltd.*, No. 93-1892, *slip op.* at 20-21, n.6 (3d Cir. May 25, 1994) (citing *Confer v. Custom Eng'g Co.*, 952 F.2d 41, 43 (3d Cir. 1991); *Frank v. Colt Indus., Inc.*, 910 F.2d 90, 98 (3d Cir. 1990); *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1040 (3d Cir. 1994)). *See also Hamilton*, 945 F.2d at 77 ("[T]his court joined six other courts of appeals that refuse to recognize oral modifications to ERISA plans."); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1164 (3d Cir. 1990) (holding that informal communications do not alter ERISA plan). Thus, the informal statements that the benefits would continue for "life" cannot alter the contractual analysis. However, given the consistency and frequency that such communications were made, the court will revisit this situation in the BOFD section.

c. Past Practice

Finally, the plaintiffs spent considerable time documenting the "past practice" at Sperry. Past practice showed that Sperry never reduced retiree medical benefits prior to this litigation. (Tr. 1/12/94 at 102, Loughlin.) One example that plaintiffs point to is the implementation of Medflex. As the Findings document, Medflex, which was considered to be a "less generous" plan, applied to *future* retirees only. Plaintiffs say this further proves the existence of the "lock-in" policy. However, just because the defendant never chose to exercise the ROR prior to this litigation does not mean it waived its

inherent right to terminate the plan. *See generally Alexander*, 967 F.2d at 93 (rejecting the idea that past practice is decisive); *Howe*, 896 F.2d at 1110 ("Merely because defendants chose to exempt retirees from plan changes in the past does not mean that defendants considered themselves forever bound to do so."); *Etherington*, 747 F. Supp. at 1279 (adopting same analysis as *Howe*).

The plaintiffs have not satisfied their burden of proving that their benefits had vested.[65] The RORs are broad and unequivocal.

3. Breach of Fiduciary Duty Claim

In the summary judgment opinion, I granted summary judgment in favor of Unisys on the Sperry plaintiffs' claim that defendant breached its fiduciary duties. *In re Unisys*, 837 F. Supp. at 679-80. Plaintiffs moved at trial for reconsideration of their BOFD claim in light of the Court of Appeals' recent decision in *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1994). Plaintiffs presumably bring their BOFD claim pursuant to the "other equitable relief" clause found in 29 U.S.C. § 1132(a)(3)(B). *See Bixler*, 12 F.3d at 1293-1294 (holding that a direct action for breach of fiduciary duty is available under § 1132(a)(3)(B)). Plaintiffs contend that even if the RORs in the SPDs were intended to apply to existing retirees, Sperry, and later Unisys, had a fiduciary obligation to make this point clear. This is not a case where one or two low-level benefits counselors told a few retirees that their benefits would continue for life. The message that medical benefits would last for life was confirmed repeatedly and systematically throughout the Sperry organiza-

65. In addition to the evidence outlined above, plaintiffs also presented other evidence that they deemed probative of the existence of this "lock-in" policy. Included in this evidence were testimony and documents that Sperry prefunded retiree medical benefits before prefunding was required; that Sperry treated the retiree benefits as an existing liability; and that Sperry earmarked certain pension funds to cover retiree medical benefit obligations in the event of a hostile takeover. I do not find these pieces of evidence significantly relevant to the actual question — whether or not the defendant created vested medical benefits for retirees, and therefore I do not address these peripheral arguments.

tion, by all levels of management, in writing and verbally. In fact, as the Findings make clear, several high level corporate executives, as well as personnel managers, testified that they believed the ROR was inapplicable to retirees and counseled individuals accordingly.

Although I recognize that the SPD is the controlling document on which participants must rely, *Curtiss-Wright*, 18 F.3d at 1040, and that informal communications cannot alter the terms of a written plan, *Hozier, supra,* this court discerns a strong current in the Third Circuit that recognizes that an ERISA fiduciary may not "affirmatively mislead" plan participants. *See, e.g., Bixler, supra; Fischer v. Philadelphia Elec. Co.,* 994 F.2d 130 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 622 (1993). Defendant urges that these cases are inapposite in a situation where the SPD itself informs the participants of the answer to their question. However, this case poses that exact question, which the Court of Appeals explicitly left open in its recent decision in *Haberern. Haberern, supra, slip op.* at 20, n.6 ("[W]e do not reach the question whether Haberern's misrepresentation argument could be upheld under section 502(a)(3), 29 U.S.C. § 1132(a)(3).") (citation omitted).

The *Fischer* case involved employees who retired prior to the employer's offering of an "early retirement plan." Although the company had announced that it might offer such a plan, when the plaintiffs inquired about such a possibility, they were told by benefit counselors that "no plan was being considered." *Fischer*, 994 F.2d at 132. The benefit counselors were telling the truth since "the Company had not kept them abreast of any discussions taking place among senior management." *Id.* In fact, serious consideration was being given to offering a "retirement sweetener." The Court of Appeals reversed the district court's granting of summary judgment in favor of the employer, holding that a material issue of fact existed as to whether or not defendants had breached their fiduciary duties by responding to employees' questions about the "sweetener" in a misleading fashion. The Court of Appeals explicitly endorsed the analysis announced by the Court of Appeals for the Sixth Circuit in *Berlin v. Michigan*

Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988), where, in a similar factual situation, the court held that: "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence . . . are owed." *Berlin*, 858 F.2d at 1163.

The Court of Appeals remanded the *Fischer* case for a determination of whether a BOFD had occurred and instructed the district court that an employer has an "[o]bligation . . . to answer participants' questions forthrightly. . . . *Put simply, when a plan administrator speaks, it must speak truthfully.*" *Fischer*, 994 F.2d at 135 (emphasis added). *Accord Mullins v. Pfizer*, 1994 U.S. App. LEXIS 9445, *18 (2d Cir. 1994) (explicitly adopting the rationale of *Fischer*). Furthermore, the court found immaterial the fact that the benefit counselors were unaware of the true state of things: "[t]hese obligations cannot be circumvented by building a 'Chinese Wall' around those employees on whom plan participants reasonably rely for important information and guidance about retirement." *Fischer*, 994 F.2d at 135. On remand, the district court found that a BOFD indeed had occurred as to certain subclasses of plaintiffs. *Fischer v. Philadelphia Elec. Co.*, No. 90-8020, *slip op.* (E.D. Pa. May 13, 1994) (Weiner, J.).

In *Bixler, supra*, the Court of Appeals seems to have gone even further in denoting the duties of an ERISA fiduciary in response to inquiries from intended plan beneficiaries. *Bixler* involved the widow of a plan participant who failed to elect to continue her medical coverage under COBRA, apparently because she misunderstood her rights. While the COBRA election period was still open, the plaintiff contacted her husband's employer to ask some questions about death benefits, but did not specifically ask for clarification of her COBRA rights. *Bixler*, 12 F.3d at 1302. The employer's agent answered Mrs. Bixler's specific question. Still, the Court of Appeals held that "while the record is sketchy," *id.*, it is possible that the employer breached its fiduciary duty by failing "to advise [Mrs. Bixler] of the available [COBRA] benefits . . . despite the fact that her inquiry was limited to the availability of a death benefit." *Id.* In short, the court held that while it was not deciding whether a breach did in fact occur, the

fiduciary's duty to inform "[e]ntails not only a negative duty not to misinform, *but also an affirmative duty to inform when the trustee knows that silence might be harmful.*" *Id.* at 1300 (emphasis added).

The evidence in this case supports a BOFD claim. First, it is clear that the highest levels of corporate management at Sperry, and later Unisys, recognized that employees might be under the mistaken belief that "lifetime" meant forever. This is evidenced in part by a confidential letter that Loughlin sent to Hirschberg, McLean and Sweeten in 1985. (P.Exh. 749.[66]) In the letter, Loughlin writes:

> *It is important to determine the implied promise that has been made regarding post-retirement medical benefits.* Recent court cases have impaired the employer's ability to reduce these benefits after retirement. The Company should consider how the promise can be limited so as to control the impact on Company costs of future medical inflation and Federal cost-shifting.

(P.Exh. 749 at 02637 (emphasis added).)[67] Similarly, two years after the merger, J.A. Blaine, then Vice-President of Human Resources for Unisys, wrote a confidential letter to W.M. Blumenthal, then CEO of Unisys, which cautioned:

> Although we have not suggested to either active employees or current retirees that we may consider changes in Post Retirement Medical for those already retired, we feel our analysis would be incomplete if we did not address possible changes to the Post-Retirement Medical Plans of our 16,000 current retirees. . . . *Many retirees*

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66. This letter incorporates information that Loughlin received from Buck Consultants, an actuary firm that performed work for Sperry. (*See* P.Exh. 747 and 748.)

67. When Hirschberg and Sweeten received this letter back in 1985, if they really believed that the benefits were vested by virtue of the inapplicability of the ROR to retirees, it is odd that they never told Loughlin that the promise was not simply "implied" but actually explicit and binding.

> *will undoubtedly suggest that when they retired, they felt that their medical program would continue without change. . . .*

(P.Exh. 62 (emphasis added).) These letters suggest that certainly by the mid-1980s, defendant understood the potential for confusion concerning the meaning of "lifetime" benefits. The defendant then exacerbated this potential with numerous informal communications that discussed lifetime benefits without explicit reference to the ROR.[68] Defendant could have easily (1) put an explicit ROR in each informal communication given to employees rather than only use the lifetime language; and (2) when employees made specific inquiries to benefit counselors during exit interviews and at group retirement sessions, the Company could have instructed the counselors to tell prospective retirees that although the word "lifetime" is used, the Company always reserves its right to terminate the plans.[69] As one law review article so appropriately notes:

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68. For a sampling of some of the informal communications from the various divisions, which mention lifetime without reference to the ROR, *see, e.g.*,: P.Exh. 143 at 220418; P.Exh. 150 at 220566; P.Exh. 640 at 028025; P.Exh. 145 at 220116A; P.Exh. 307 at 220242; P.Exh. 159 at 058446-058447; P.Exh. 165; P.Exh. 163 at PR1 004464; P.Exh. 168 at PR1 006138; P.Exh. 124 at 440252.

69. Plaintiffs presented credible testimony that some individuals specifically asked if their benefits would continue for life and were told they would, without any mention of the ROR.

For instance, Dahl, a member of the Sperry Corporation Personnel Council (P-T Stip. at ¶ 16), testified: "[T]here were discussions [with employees] . . . how does that impact us with respect to our plans following retirement? Will that be changed? Will you modify those? And, no whatever. Whatever. Whatever was in effect remains in effect, and we — *we were very explicit in pointing out that we had never ever made a change in the benefit program of a — of a medical plan of a Sperry employee who had retired.*" Dahl also testified that these people were never told that the corporation was reserving the right to make such a change in the future after they retired, " . . . because they weren't." (P.Exh. 631 at 41-42, Dahl Dep.) (emphasis added).

Similarly, retirement counselor Roy Hain ("Hain") responded to questions about the reservation of rights clause raised by potential retirees by saying that the language "pertained to active employees and not to the retirees." (Tr. 11/23/93 at 327, Hain.) And, Jerry Scovel ("Scovel") personnel manager at one of Univac's facilities, admitted to routinely telling inquiring

> *Management should have its exit interview personnel adopt a simple mantra, to be repeated religiously and without deviation: Retiree welfare benefits are subject to change or termination.*
>
> Employer forms delivered to employees at retirement should also be reviewed for warning language. These forms should never have clauses such as "for life" . . . unless the company truly intends such benefits to be unchanging for the life of retirees.

E. Van Olson, *Nonpension Retiree Benefits: Are They For Life? Management Guidelines to the Issue,* 36 Lab. L.J. 402, 407 (1985) (emphasis added). *See also* James F. Stratman, *Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice,* 10 Indus. Rel. L.J. 350 (1988) (documenting empirical research which shows that SPDs with lifetime language can lead readers to conclude their benefits are for life). This court does not mean to suggest that ERISA requires such prudent behavior in all circumstances in order to avoid a finding of BOFD. Obviously, the purpose of the SPD would be undermined if employers were required to explain every detail contained within it. However, when faced with a specific inquiry as to the explanation of benefits, an employer cannot give vague or incorrect answers, especially on a repeated and pervasive basis.

Because the BOFD claim was not directly before the court, I am not holding that a breach did in fact occur. Rather, I am granting reconsideration of this issue on the premise that based on the evidence and the law in this circuit, it seems possible that at least some plaintiffs will be able to sustain a BOFD claim. Additionally, because some plaintiffs have stronger cases than others based on their specific inquiries and the information given to them personally, the court finds that subclasses, and possibly even individual hearings, will be necessary to adjudicate these claims. The parties will

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employees that their post-retirement medical benefits were "guaranteed to them for life." (P.Exh. 802 at 16, Scovel Dep.)

This is just a small sample of some of the evidence on this issue.

need to brief this issue, as well as the question of what damages are recoverable in a situation such as this.[70] However, given the complexity of the legal question involved in this matter, and the uncertainty of the contours of *Bixler,* the court finds, pursuant to 28 U.S.C. § 1292(b), that the decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this decision will materially advance the ultimate termination of the litigation. Accordingly, the court intends to certify this case for interlocutory appeal.

4. Equitable Estoppel

In the summary judgment opinion, I granted summary judgment in favor of Unisys on plaintiffs' claim of equitable estoppel. *In re Unisys,* 837 F. Supp. at 680-81. Just as the Sperry plaintiffs moved at trial for reconsideration of their BOFD claim, they similarly moved for reconsideration of their equitable estoppel claim. However, I am of the opinion that my original analysis on this point is correct and therefore deny plaintiffs' motion for reconsideration on this claim.

III. THE UNISYS VERIP RETIREES

As previously stated, the parties presented the claims of the Unisys VERIP retirees wholly separately from the Sperry regular retiree claims. This decision resulted, in large mea-

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70. Defendants submit that the Supreme Court's decision in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993), forecloses the possibility that monetary damages are recoverable under 29 U.S.C. § 1132(a)(3)(B). *See generally Spinelli v. Gaughan,* 12 F.3d 853, 857 (9th Cir. 1993) (holding that *Mertens* removes any doubt as to whether damages are available for a violation of section 502(a)(3)); *Totoro v. H.A. De Hart & Son, Inc.,* 1994 WL 114562, *3 (D.N.J. Mar. 29, 1994) (noting that the Third Circuit allows a direct cause of action for breach of fiduciary duties under § 1132(a)(3)(B) but does not permit monetary relief); *Peachin v. Aetna Life Insur. Co.,* 1994 U.S. Dist. LEXIS 1987, *29-33 (N.D. Ill. Feb. 22, 1994) (discussing *Mertens*).

The parties did not brief the issue of what damages would be available should a BOFD claim be sustained. If *Mertens* limits the recovery under § 1132(a)(3) to "equitable" relief, the parties will need to address what kind of relief might be appropriate in this context.

sure, from the fact that lifetime language was *not* used to describe the duration of the medical benefits under the Unisys plan.

The plaintiffs in this group are individuals who retired early pursuant to a VERIP and gave up future years of income, and pension accruals, in return for the VERIP package. Plaintiffs say that part of the "deal" was that their medical benefits would not be terminated, although these plaintiffs always knew that their benefits were not without cost.[71] Defendant argues that they always reserved the right to terminate the medical benefits and that the VERIP participants received other perks under the VERIP which are not at issue in this litigation.

Although the underlying facts differ significantly from those surrounding the Sperry group, the main issue is the same, namely whether the VERIP plaintiffs are entitled to vested medical benefits. The VERIP plaintiffs brought the same claims as the Sperry regular retirees, including a claim for breach of contract; breach of fiduciary duty and equitable estoppel. However, these plaintiffs base their contract claim on a bilateral contract theory, in accordance with the analysis of Judge Feikens in *Sprague v. General Motors Corp., supra,* arguing that by signing up for the VERIP, they entered into separate bilateral contracts independent of the normal retiree benefit plans, and that this created a binding contract under which Unisys was not free to change the terms.

A. FINDINGS OF FACT

1. Background Information on Unisys Plan

105. Following the merger of Burroughs and Sperry to form Unisys in 1986, Unisys sought to unify all of the benefit plans offered to its employees. By 1988, Unisys had succeeded in consolidating all of the active Sperry and Burroughs

71. Unlike some of the Sperry plans, the Unisys plan that covered these individuals required contributions from the employee. The amount of contribution was based on a formula that included the individuals' age and years of service.

programs, which included benefits such as life insurance and dental. (Tr. 1/13/94 at 155, Massman.)

106. Unisys issued an SPD in 1988 ("the 1988 SPD") that covered these unified programs. (D.Exh. 3.) The 1988 SPD had a ROR which gave Unisys the right to terminate the plans described in the SPD "at any time." (D.Exh. 3 at 058027.)

107. The 1988 SPD did not cover expressly post-retirement medical benefits because the post-retirement medical plan was not yet complete. Rather, under the heading "Retirement," within the "Medical Plan" section of the 1988 SPD, Unisys alerted employees that a unified post-retirement plan was in the works:

> If you have completed the required years of service and are at least 55 at the time your employment terminates, you and your covered eligible dependents may elect to participate in the Unisys Post-Retirement and Extended Disability Medical Plan. *The plan coverages, contributions and participation requirements are available from your Benefits Administrator beginning late in the fall of 1988.*

(D.Exh. 3 at 057940 (emphasis added).) Although the 1988 SPD predicted that the plan would be available in the fall of 1988, the plan in fact was not ready until the spring of 1989. (Tr. 1/13/94 at 155-56, Massman.)

108. The Unisys Post-Retirement and Extended Disability Medical Plan ("the Unisys Plan") was effective for those employees retiring on or after April 2, 1989. (D.Exh. 2 at 058034.)

109. When Unisys finally announced the Unisys Plan in the spring of 1989, employees were given a summary handout explaining its terms. (D.Exh. 2.) There was no separate SPD for this plan; rather the four-page summary ("the summary") apparently incorporated by reference the 1988 SPD which had

already alluded to the plans' creation. (D.Exh. 2 at 058034.)[72] The summary did, however, include its own ROR which provided:

> As with other benefit programs, the Company reserves the right to change or terminate the Unisys Post-Retirement and Extended Disability Medical Plan. Should the Plan be terminated, coverage for all participants would end.

(D.Exh. 2 at 058036.)

110. Unlike the plans discussed in the Sperry section, *supra*, the Unisys Plan did not mention lifetime coverage. Additionally, the plan included age and service requirements in order to participate, as well as monthly contributions. (D.Exh. 2 at 058035.) The Unisys Plan was clearly a less generous plan than its predecessors.

111. The monthly contributions were based on: the cost of the Plan in the year participation begins; the number of points represented by the sum of the individual's age and service; and whether or not covered dependents were eligible for Medicare. (D.Exh. 2 at 058035.)

112. Because Unisys determined the amount of contribution at the time of participation, there was no guarantee of what the employee's contribution rate would be until retirement. Furthermore, even after retirement, the plan suggested that contribution rates might change:

> Unisys will attempt to maintain your contributions at the levels in effect during the year in which your participation begins. *However, this cannot be guaranteed*, given the unpredictable conditions which continue to influence post-retirement medical coverage, such as rising medical costs and legislative actions.

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72. Plaintiffs argue that no SPD ever existed for the Unisys Plan. Defendant asserts that the existence of the 1988 SPD along with the summary of plan provisions, which specifically provides that "[u]nless noted otherwise, the provisions are the same as . . . described in your Summary Plan Description Booklet. . ." (D.Exh. 2 at 058034), belies plaintiffs' argument.

(D.Exh. 2 at 058036 (emphasis added).) Furthermore, as stated *supra*, both the 1988 SPD and the summary reserved Unisys' right to terminate the plan completely.

113. Even in the face of this unambiguous language, plaintiffs testified that the contribution rates could not be changed once an individual retired. Plaintiffs say that it was Unisys' policy to "freeze" contribution rates at retirement. (*See, e.g.*, P.Exh. 571 at 16, McCleary Dep., P.Exh. 564 at 228-29, Penhale Dep.).

114. There is evidence that suggests there was some confusion about whether contribution rates were frozen forever, or subject to change. For example, Buck Associates ("Buck"), an actuary/consulting firm Unisys hired to perform a valuation of retiree medical benefits, prepared a confidential valuation in which it described retiree contribution levels as "frozen" at retirement. (P.Exh. 732 at B0000458.) The exact paragraph of the Buck report reads:

> Under the current plan, retiree contributions are based on the cost of medical benefits at the time of retirement, *and are frozen after that time.* Unisys absorbs 100% of cost increases after retirement.

(*Id.* (emphasis added).) However, these statements that contribution rates were "frozen" do not alter the fact that a ROR existed, as well as an explicit notation that Unisys was not guaranteeing that contribution rates would remain unchanged.

2. The 1989 VERIP

115. In September, 1989, Unisys announced a Voluntary Retirement Incentive Program ("VERIP") for active employees who retired between October 1, 1989 and December 1, 1989. (P.Exh. 550.) One of the main goals of the VERIP was to reduce payroll.

116. Unisys sent eligible employees a packet of information to help them make their decisions. (P.Exh. 550.) The cover letter accompanying the information packet stated in bold: "It is important to keep in mind that Unisys will not

extend the provisions of this Program beyond the November 15, 1989 deadline, regardless of employment conditions and/or any subsequent election you may make to retire." (P.Exh. 550 at 009695.)

117. In the approximately two-month period that eligible employees had to consider the program, Unisys advised them to read the terms of the VERIP, as well as to speak with a Unisys representative. (P.Exh. 550 at 009698.)

118. The actual 1989 VERIP document ("VERIP document" or "offering document") was a fifty-two page document which contained a TOC. (P.Exh. 550 at 009696-009697.) In the "Introduction" section, the document described the major elements of the program as:

> • a lifetime retirement enhancement that adds two years to your age and service for calculations of your benefits under the Unisys Pension Plan formula and your points in determining your contribution rates for the Unisys Post-Retirement and Extended Disability Medical Plan.
>
> • a retirement supplement of $500 per month payable until you reach Social Security eligibility at age 62

(P.Exh. 550 at 009698).

119. The retirement enhancement for pension formula purposes and the $500 monthly supplement are not at issue in this litigation and remain in force.

120. Beginning on page 33 of the offering document was a section titled "Other Benefits Following Retirement." This section covered what medical benefits a VERIP participant would receive. An individual electing the VERIP would be covered by the same Unisys Post-Retirement and Extended Disability Medical Plan, the Unisys Plan described *supra,* that he or she would have been as a regular retiree, the only difference being that the VERIP offered a lifetime enhancement of two years toward age and service for purposes of determining the contribution rate. (P.Exh. 550 at 009730.)

121. Unisys specifically alerted the VERIP participants, in the VERIP offering document, that the contribution rates were not guaranteed: "Unisys will attempt to maintain your contributions at the levels in effect during the year in which your participation begins. However, this cannot be guaranteed, given the unpredictable conditions that continue to influence post-retirement medical coverage, such as rising medical costs and legislative actions." (P.Exh. 550 at 009731.) Furthermore, the underlying Unisys Plan pursuant to which the VERIP participants were receiving benefits contained an unambiguous ROR which gave Unisys the right to terminate the plan completely.

122. Plaintiffs failed to present any evidence showing that Unisys intended to vest medical benefits when it offered the VERIP to its employees.

123. Witnesses who participated in the 1989 VERIP testified that had they known that their medical benefits could be terminated, they would not have volunteered for early retirement. (*See* Tr. 1/16/94 at 148-149, Barrosse; Tr. 1/6/94 at 158, Canfield.) However, the court finds no basis for the witnesses' understanding that their benefits were vested. In fact, one of the witnesses who retired pursuant to the 1989 VERIP admitted that he had not read the passage set forth *supra* where Unisys noted that contribution rates were not guaranteed. (Tr. 1/6/94 at 159, Canfield.)

3. The 1991 VERIP

124. In July, 1991, Unisys offered another VERIP to employees who retired between July 25, 1991 and October 31, 1991. (P.Exh. 552 at 010601.)

125. Similar to the 1989 VERIP, the 1991 VERIP offered certain age and service enhancements, as well as a lump-sum pension payment option that normally was not available under the Unisys Pension Plan. (P.Exh. 552 at 010606.)

126. Unisys sent eligible employees a packet of information to help them make their election. (P.Exh. 552.)

127. The actual 1991 VERIP document ("VERIP document" or "offering document") was a thirty-six page document which contained a TOC. (P.Exh. 552 at 010603.) The section titled "Program Features," which was page 4 of the document, highlighted the elements of the program.

128. The plan offered no special medical benefits to the VERIP participants that differed from the regular Unisys Plan, other than the fact that the age requirement for participation was reduced from age 55 to age 54. (P.Exh. 552 at 010606.)

129. In the section describing medical benefits available to the VERIP participant, this offering document was even more explicit in its statement that the benefits were not guaranteed:

> The Unisys Post-Retirement and Extended Disability Medical Plan provides the same coverages as the Unisys Medical Plan Option 2 available through the Unisys Flexible Benefits Program. *Unisys cannot, however, guarantee that post-retirement medical coverage will not be changed in the future. The Company continues to reserve the right to modify or terminate this coverage at any time.*
>
> * * *
>
> *Although Unisys will attempt to maintain your contributions at the levels in effect during the year in which your participation begins, the Company cannot guarantee that the contribution levels will remain unchanged in the future. The Company continues to reserve the right to increase contribution levels at any time.*

(P.Exh. 552 at 010622-010623 (emphasis in original).

130. The court finds that Unisys unambiguously reserved its right to increase contribution rates[73] and/or terminate the medical plan.

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73. Plaintiffs make much of the fact that Mary Massman ("Massman"), the individual who drafted the clause stating that the Company was not guaranteeing contribution levels would remain unchanged, noted in a confidential document that she "added language used for VRIP to *waffle* on commitment to hold contribution rates steady." (P.Exh. 527 at 075184 (emphasis added); P.Exh. 569 at 237-239, Massman Dep.)

131. Although some of the participants in the 1991 VERIP testified that they would not have accepted the plan if they had been told the medical benefits could be changed or terminated, (*see, e.g.,* Tr. 1/6/94 at 165-166, Lambert), the court finds that the document was clear on its face. Plaintiffs presented no testimony from any VERIP participant who made a specific inquiry about the duration of his medical benefits and was given misleading, or false, information. [74]

B. CONCLUSIONS OF LAW/ANALYSIS

1. General ERISA Law

Since the opinion outlines the general ERISA law in Section IIB, *supra,* there is no need to repeat it here. The same legal principles govern the VERIP claims as the regular retirees' claims.

2. Bilateral Contract Theory

The VERIP plaintiffs claim that because they gave up valuable consideration, in the form of future years of earnings and pension accruals, the company entered into a separate binding contract with them. Plaintiffs rely on Judge Feikens analysis in *Sprague v. General Motors Corp.,* 843 F. Supp. 266 (E.D. Mich. 1994). While this court recognizes the validity of the bilateral contract theory, the facts in this case are unlike those in *Sprague.*

Plaintiffs ask this court to infer from the use of the word "waffle" that at least some kind of ambiguity was created, or at worst fraud was committed. However, plaintiffs ignore the unambiguous clauses which alerted the 1991 VERIP participants that their medical benefits might be terminated, regardless of what word Massman used in a confidential memorandum.

74. Although the court sympathizes with the plight of the individuals who now must pay for their own medical coverage, the language in the 1991 VERIP document was clear that Unisys was not making any promises that these benefits would last forever. In fact, Mr. Lambert, one of the participants, implicitly acknowledged this when he testified: "I remember reading that [the clauses reserving Unisys' right to make changes in the future], but I accepted it as I'll use the term 'legalese,' just something that's written into a contract and to me it had really no impact as to the company would terminate, like that was not even in my thinking at the time of reading that." (Tr. 1/16/94 at 168, Lambert.)

Sprague involved a putative class of 84,000 General Motors ("GM") retirees who challenged GMs' decision to modify their retiree medical benefits. In 1991, the court granted summary judgment to GM on the claim of its regular retirees even in the face of lifetime language, but held that the claims of the approximately 40,000 "early retirees" could proceed on a bilateral contract theory. *Sprague*, 768 F. Supp. at 606. As Judge Feikens saw it, the early retirees had entered into a "special deal," one element of which was lifetime medical benefits at no cost. *Sprague,* 843 F. Supp. at 299.

Although the Unisys VERIP plaintiffs claim that *Sprague* is "on point," a review of the facts and the rationale for the court's decision establishes that it is not. For one, the word "lifetime" was consistently used in the *Sprague* documents, which is not the case here.[75] More importantly, however, the facts in this case show that the VERIP never included a "special deal" on health care benefits. Plaintiffs presented no evidence that the VERIP participants were receiving a different medical plan than the regular Unisys Plan, which notably contained a ROR. The only special medical benefits these individuals were receiving was a two year enhancement to their age and service calculation. Additionally, the VERIP participants received non-medical related benefits (i.e. a monthly supplement) and presumably recognized that if they did not take the offer, there was always the possibility that they would be laid off. Finally, italicized notations appeared directly in the VERIP offering documents which alerted individuals that

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75. The only time the word "lifetime" was used was in the 1989 VERIP which spoke of a "lifetime retirement enhancement." Plaintiffs ask this court to infer that the use of this single word led individuals to believe that their benefits were vested. However, the VERIP situation is vastly different from the Sperry situation where lifetime was used in the SPD to describe the duration of benefits and was used consistently in all forms of communication. Simply using the term "lifetime retirement enhancement" to describe the age and service incentive does not create an ambiguity. *See Chevrin v. Sulzer Bingham Pumps, Inc.*, 1990 WL 303125 (D. Or. 1990) (holding that using the term "Lifetime Maximum Benefit" in plan documents did not create any ambiguity).

their rates were not guaranteed, and the 1991 VRIP specifically said the plan itself was not guaranteed.

3. Breach of Fiduciary Duty & Equitable Estoppel

The court has set forth its analysis of the law in this area in Section IIIB3, *supra*. However, the testimony presented by the VERIP participants appears to fall short of any "affirmative misrepresentations." Although the plaintiffs point to the confusion about whether rates were "frozen" at retirement or could be changed, here the SPD itself, as well as the VERIP offering documents, was clear on the point. The VERIP participants did not present any evidence similar to that of the Sperry plaintiffs of a systematic campaign of confusion. Additionally, the word "lifetime" was not used in the Unisys SPD or the informal communications sent to the Unisys VERIP participants. Accordingly, the court enters judgment in favor of Unisys on both the remaining fiduciary and estoppel claims.

IV. CONCLUSION

This case comes at a critical time when our country grapples with health care reform on a daily basis, and the price of medical care continues to skyrocket. In the years to come, losing one's employer-provided health care may not be a possibility. In the meantime, however, courts must decide cases on the law as it stands and put aside any sympathies.

Under current law, an employer is not required to sponsor a medical benefit plan. When an employer does provide such a plan, it is subject to the rules and requirements of ERISA. However, Congress evidenced its recognition of the need for flexibility in the area of welfare benefit plans and specifically rejected the automatic vesting of such plans. The Court of Appeals for the Second Circuit explained the rationale for this decision several years ago:

> Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables . . . . [M]edical insurance must take account of inflation, changes in medical practice and technology, and

> increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). Thus, a plaintiff who claims that he or she is entitled to vested medical benefits bears the burden of proof.

In this case, neither the Sperry or Unisys plaintiffs carried their burden. While the juxtaposition of the lifetime language and the ROR may have misled the Sperry plaintiffs, the Court of Appeals for the Third Circuit has evidenced a strong policy of upholding unambiguous ROR clauses. Furthermore, even accepting that an ambiguity had been created, I found, as a matter of law, that the plaintiffs did not sustain their burden of proving that their benefits had vested.

However, I am concerned that a breach of fiduciary duty may have occurred in some cases of Sperry plaintiffs.[76] To allow an employer to mislead its employees with constant references to lifetime benefits when it appears the employer is aware of the confusion seems to be a dangerous and pernicious precedent. The Court of Appeals will no doubt correct me if I am incorrectly interpreting the case law that it created with *Fischer* and *Bixler*. The Unisys VERIP plaintiffs, on the other hand, did not present any evidence which suggested a

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76. The plaintiffs' evidence on this point is unusually strong. Not only were there numerous written documents referring to "lifetime" coverage without mention of the ROR, but as the Findings document, oral misrepresentations occurred in response to specific questions from those considering retirement. Finally, an audio tape from a 1986 pre-retirement meeting was played for the court in which the speaker told the audience: "Don't worry, they would not have offered the program, okay, in this manner, shape or form, leaving the medical intact, if their intention was to take it away from retirees. They would just not. They'd tell you that you weren't going to be able to go with it. So I wouldn't even think twice about it. And I mean that sincerely. . . . *[y]ou go with the medical and you have that, as far as I'm concerned, for life, okay.*" (P.Exh. 714B (emphasis added).) Although this tape recording was played for an audience of potential Sperry VRIP participants, a group that is no longer part of this lawsuit, the court uses this evidence inferentially to confirm the likelihood that such oral misstatements were universally made by defendant.

breach of fiduciary duty and thus on all of their claims, the court rules in favor of the defendant.

Just as in war there are no winners, so it seems that is the case here. These plaintiffs are individuals who worked, in some cases, for thirty or forty years for a corporation they believed in and trusted. This is a corporation that provided a generous benefit and may have continued providing it if medical costs had not so escalated and FAS 106 had not become a reality. However, the duty of this court is to uphold the law. Under ERISA the plaintiffs are not entitled to vested medical benefits.

An appropriate order follows.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS CORPORATION RETIREE : :MDL No. 969
MEDICAL BENEFITS ERISA LITIGATION :

ORDER

CAHN, C.J. June 23, 1994

AND NOW, this 23 day of June, 1994, IT IS ORDERED that:

1. Judgment is entered in favor of Unisys and against the Sperry plaintiffs on the denial of benefits claim and the estoppel claim.

2. Judgment is entered in favor of Unisys and against the Unisys 1989 and 1991 VERIP plaintiffs on all of their claims.

3. The Sperry Plaintiffs' motion for reconsideration of their Breach of Fiduciary Duty Claim is GRANTED and the plaintiffs may proceed on this theory.

4. The parties are ordered to schedule a conference with the court within one week from the date of this order to discuss certification pursuant to 28 U.S.C 1292(b), and logistics concerning how to proceed with the breach of fiduciary duty claim.

5. All other outstanding motions are DENIED as moot.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn, Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS CORPORATION RETIREE :
: MDL No. 969
MEDICAL BENEFITS ERISA LITIGATION:

OPINION

CAHN, C.J. October 13, 1993

Plaintiffs allege that Unisys Corporation violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, when it unilaterally modified their retiree medical benefit plans. The court has subject matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Currently before the court is Unisys' Motion for Partial Summary Judgment. For the reasons set forth below, the court will grant the motion in part and deny it in part.

I. BACKGROUND

In September of 1986, Sperry Corporation and Burroughs Corporation merged to form Unisys Corporation. After the merger, Unisys maintained the pre-existing medical benefit plans ("the predecessor plans") for Sperry and Burroughs retirees. In 1989, Unisys created the Post-Retirement and Extended Disability Medical Plan ("the old plan") to cover all employees who retired after April 1, 1989, most of whom were former Sperry and Burroughs employees. At that time, Unisys left the predecessor plans intact. On January 1, 1993, Unisys terminated the predecessor plans and the old plan and replaced these plans with the new Unisys Post-Retirement and Extended Disability Medical Plan ("the new plan"). Under the new plan, the retirees no longer receive free medical insurance. Instead, they must pay a portion of the monthly premiums. After January 1, 1995, the retirees will have to pay the full cost of premiums.

Eight different lawsuits have been filed against Unisys in four jurisdictions.[1] The Judicial Panel on Multidistrict Litigation transferred all lawsuits filed outside this district here for consolidated disposition. *See* 28 U.S.C. § 1407. Plaintiffs seek primarily injunctive and other equitable relief. On June 9, 1993, after determining that Unisys "has acted on grounds generally applicable to the class," the court certified this case as a class action pursuant to Fed. R. Civ. P. 23(b)(2). The class consists of approximately 21,000 former non-union employees of Sperry, Burroughs and Unisys. Plaintiffs have been assigned to sub-classes according to who their employer was at the time of retirement.[2] Each sub-class contains some plaintiffs who accepted early retirement incentive packages ("early retirees") and some who did not ("retirees").

Plaintiffs allege that Unisys has denied them vested benefits in violation of 29 U.S.C. § 1132(a)(1)(B). Plaintiffs also allege that Unisys breached its fiduciary duty under 29 U.S.C. § 1104. Finally, plaintiffs seek relief on various estoppel theories. Unisys has moved for partial summary judgment on all claims brought by retirees. Unisys has not moved for summary judgment against the early retirees in the class.

II. SUMMARY JUDGMENT

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that

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1. The eight cases are: *Bennett v. Unisys Corp.*, Civ. No. 93-1668 (E.D. Pa.); *Valle v. Unisys Corp.*, Civ. No. 93-1431 (E.D. Pa.); *McMahon v. Unisys Corp.*, Civ. No. 93-0704 (E.D. Pa.); *Romano v. Unisys Corp.*, Civ. No. 92-6938 (E.D. Pa.); *Yerkes v. Unisys Corp.*, Civ. No. 92-6906 (E.D. Pa.); *Mercure v. Unisys Corp.*, No. 2:93-CV-71055 (E.D. Mich.); *Pronk v. Unisys Corp.*, No. 3-92-812 (D. Minn.); *Lofaso v. Unisys Corp.*, No. 92-5429 (E.D.N.Y.).

2. The caption of this case is not entirely accurate. Some of the class members are disabled and are not formally considered retirees. The parties have treated the claims of disabled former employees as being identical to those of "retirees." Since counsel has not drawn a distinction, the court will consider the claims to be similar.

there is an absence of evidence to support the non-moving party's case. *Celotex v. Catrett,* 477 U.S. 317, 325 (1986). To avoid summary judgment, the non-moving party must identify material issues of fact as to each element of his claim. *Id.* at 323.

When considering a motion for summary judgment, the court must draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986). The court, however, may not make credibility determinations or weigh the evidence. *Id.* at 252. If the record thus construed could not lead the trier of fact to find for the non-moving party, then there is no genuine issue for trial. *Matsushita Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Plaintiffs urge the court to delay consideration of Unisys' motion until the close of discovery. Counsel has filed a Rule 56(f) affidavit setting forth the type of material likely to emerge from further discovery.[3] None of this material, however, would change the court's analysis of the threshold legal question. *See Lunderstadt v. Colafella,* 885 F.2d 66, 71 (3d Cir. 1989) (Rule 56(f) motion must identify particular information that would preclude summary judgment).[4] Whether an ERISA plan is ambiguous is a question for the court, as a matter of law. *Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90, 92 (3d Cir. 1992). Summary judgment "should be entered only if the pertinent provisions of the contractual documents are unambiguous; it is the lack of ambiguity within the express

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3. Fed. R. Civ. P. 56(f) provides: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

4. Plaintiffs argue that "a proffer and analysis of extrinsic evidence will be necessary before the Court can determine whether documents are ambiguous . . . . " Rule 56(f) affidavit of Alan M. Sandals. As discussed, *infra* Section III of this opinion, plaintiffs' assertion is only partly correct. Only after a plausible alternative meaning is proffered, does the court actually examine the extrinsic evidence.

terms . . . that forecloses any genuine issues of material fact." *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). To the extent the plan language is ambiguous, summary judgment is inappropriate.

III. DENIAL OF BENEFITS

ERISA provides that plan participants may bring a civil action to recover benefits due and to clarify their rights to future benefits. 29 U.S.C. § 1132(a)(1)(B). Plaintiffs allege that Unisys has reneged on its promise to provide lifetime health coverage. They assert that Unisys' intent to confer vested benefits can be discerned from the official plan documents or, to the extent those documents are ambiguous, from the informal communications between the parties. Plaintiffs seek money damages for Unisys' failure to pay premiums since January 1, 1993. They also seek declaratory and injunctive relief to force Unisys to continue paying the full cost of premiums.

Unisys maintains that it has an inherent right to terminate the retiree's medical benefit plan. Unisys argues that it expressly reserved its termination rights in the official plan documents. Because it believes that the reservation of rights language is unambiguous, Unisys has moved for summary judgment.

ERISA recognizes two types of benefit plans: pension plans and welfare plans. *Deibler v. Local Union 23,* 973 F.2d 206, 209 (3d Cir. 1992). A benefit plan that provides medical insurance for its participants is considered a welfare plan. 29 U.S.C. § 1002(1). The parties agree that the old plan and predecessor plans are welfare plans, but they disagree about whether they conferred vested benefits upon plaintiffs. Welfare benefits do not vest automatically, *Alexander,* 967 F.2d at 95, but the plan sponsor may, under certain circumstances, become obligated to maintain benefits at a fixed level for a fixed period of time. *Wise v. El Paso Natural Gas Co.,* 986 F.2d 929, 937 (5th Cir. 1993). Congress rejected automatic vesting for welfare plans, 29 U.S.C. § 1051, because plan spon-

sors cannot accurately predict future costs. The court must determine whether, despite this uncertainty, Unisys, Burroughs or Sperry chose to confer vested benefits upon its retirees.

The scope of a welfare plan is defined by the summary plan description and the official plan documents. *Henglein v. Informal Plan For Plant Shutdown Benefits,* 974 F.2d 391, 400 (3d Cir. 1992); *Moore v. Metropolitan Life Ins. Co.,* 856 F.2d 488, 492 (2d Cir. 1988). The courts have held that such plans are not subject to amendment as a result of informal communications between employer and employees. *Moore,* 856 F.2d at 492. This includes oral promises made by the employer or its agents. *Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155, 1163 (3d Cir. 1988); *Musto v. American General Corp.,* 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied,* 490 U.S. 1020 (1989). The Eleventh Circuit Court of Appeals has succinctly stated that: "any retirees' right to lifetime medical benefits at any particular cost can only be found if it is established by contract under the terms of the ERISA-governed benefit plan document." *Alday v. Container Corp. of America,* 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied,* 498 U.S. 1026 (1991). This rule of construction furthers ERISA's mandate that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1).

ERISA requires that the written instrument contain a comprehensive description of plan coverage. *See* 29 U.S.C. § 1022. The Third Circuit Court of Appeals has held that 29 U.S.C. § 1022 requires plan sponsors to "warn employees of adversity." *Alexander,* 967 F.2d at 94. There are, under ERISA, two types of adversity: loss of benefits under an existing plan *and* loss of benefits due to termination of a plan. Subsection 1022(b) provides in pertinent part that "[t]he plan description and summary plan description shall contain the following information: . . . circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." It is unclear from this statutory language whether plan sponsors must warn participants about both types of adversity.

As a threshold matter, the parties disagree about what the background rule should be, namely whether or not termination rights are retained when governing plan documents are silent. *See Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993) (*en banc*). Plaintiffs maintain that a plan sponsor's failure to reserve its termination rights constitutes a waiver of those rights. This precise issue was left undecided in *Hozier,* 908 F.2d 1155, 1162 (3d Cir. 1990), where the court noted that "plaintiffs might be correct that an employer's purported amendment is invalid if the original plan's governing documents fail to reserve an amendment power expressly." Similarly, the Third Circuit was not squarely faced with the issue in *Alexander,* where the only issue on appeal was whether the reservation of rights language was ambiguous. *Id.* at 92.

Unisys argues that its inherent right of termination is preserved unless explicitly waived in the summary plan description. Unisys relies on *Wise,* in which the Fifth Circuit held that § 1022(b) "relates to an individual employee's eligibility under then existing, current terms of the Plan and not to the possibility that those terms might later be changed, as ERISA undeniably permits." 986 F.2d at 935. Under the holding in *Wise,* "mere silence is not of itself abrogation," and consequently, plan sponsors need not inform participants of the possibility that an existing plan will be terminated. *Id.* at 938.

This dispute is academic because Unisys and its predecessors have chosen to include reservation of rights clauses in the relevant plan documents. *Alexander* holds that summary judgment may not be granted unless the reservation of rights language is unambiguous.

Plaintiffs urge that the motion for partial summary judgment should be denied for two reasons. First, they argue that the reservation of rights language is ambiguous. Second, to the extent the reservation of rights language is not ambiguous, they argue that it is inconsistent with other portions of the

summary plan descriptions that guarantee lifetime medical coverage.[5] The court will address these arguments in turn.

The court's analysis of the operative language is guided by the decision in *Mellon Bank N.A. v. Aetna Business Credit*, 619 F.2d 1001 (1980).[6] To determine whether or not a document is ambiguous, the court must:

> consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning. The trial judge must then determine if a full evidentiary hearing is warranted. If a reasonable alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience, objective evidence in support of that interpretation should be considered by the fact-finder.

Id. at 1011. Similarly, in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 814-815 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992 (1993), the court held that "the question of whether . . . plan documents contain agreements to vest entitlement to

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5. At oral argument, counsel for Unisys noted that this back-up argument is only available to plaintiffs in the Sperry sub-class, because the Unisys and Burroughs plan documents do not discuss "lifetime benefits." The court agrees. Therefore, the court will confine its discussion of this argument to Section III-C of this opinion, which discusses the Sperry plan documents. Plaintiffs argue that Unisys places too much emphasis on the absence of "lifetime" language in the Unisys and Burroughs documents. They maintain that "[i]t was not the corporate culture in Burroughs to use the express 'lifetime' word, but it's our view — and the cases back this up — you don't have to use the word 'lifetime' to imply a vested benefit." Transcript of Oral Argument at p. 47. At this stage of the proceedings, however, the court is not interested in comparing the "corporate culture" of Unisys, Burroughs, and Sperry. The court must confine its analysis to the written documents. In any event, to the extent the corporate culture included lifetime welfare benefits, one would expect the documents to reflect that culture.

6. There was some suggestion that *Mellon Bank* does not apply in the ERISA context. Although *Mellon Bank* was decided as a matter of state contract law, it has been cited with approval in subsequent ERISA decisions. *See Alexander*, 967 F.2d at 95 n.1.

lifetime retirement benefits should be determined without reference to extrinsic evidence if the terms of the writings involved are unambiguous."[7] Accordingly, the court turns to the applicable documents.

A. UNISYS PLAN DOCUMENTS

The old plan applied to all class members who retired after April 1, 1989 (or May 1, 1989, in the case of former Burroughs employees.)[8] The summary plan description contains the following disclaimer:

> Unisys expects to continue the plans described in this booklet, but necessarily reserves the right to change or end them at any time. The Company's decision to change or end the plans may be due to changes in federal or state laws governing welfare benefits, the requirements of the Internal Revenue Code or ERISA, the provisions of a contract or a policy involving an insurance company or any other reason.

Exhibit 2, Appendix in Support of Motion for Partial Summary Judgment. Unisys argues that this language is an unqualified expression of its unilateral right to terminate the plan. Plaintiffs have proffered several alternative interpretations of this language, none of which are plausible. First, they maintain that the reservation of rights language could be read to apply only to active employees. Plaintiffs have submitted a series of affidavits from class members who understood there to be a "lock-in" policy such that changes in coverage affected active employees but not retirees. Plaintiffs have

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7. It appears that *Senn* is still good law, notwithstanding the Seventh Circuit's recent decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (*en banc*).

8. The Unisys sub-class includes: "[a]ll non-union retired, disabled and other eligible former employees and their spouses and dependents who as of November 3, 1992 were participants in or beneficiaries of the employee welfare benefit plans pursuant to which Unisys has provided medical benefits to former employees of Unisys who retired, became disabled or otherwise became eligible on or after April 2, 1989, in the case of former Sperry employees, and May 2, 1989, in the case of former Burroughs employees."

also proffered extrinsic evidence that purports to establish a course of conduct under which plan modifications were not applied to retirees. If plaintiffs alternative interpretation of the reservation of rights clause was plausible, the court would be obliged to consider this evidence. *Mellon,* 619 F.2d at 1011. Plaintiffs interpretation, however, is arbitrary and finds no support in the language of the plan. The clause makes no distinction between active employees and retirees. Furthermore, the act of retirement itself does not trigger the vesting of welfare benefits. *Howe v. Varity Corp.,* 896 F.2d 1107, 1110 (8th Cir. 1990); *Etherington v. Bankers Life & Casualty Co.,* 747 F. Supp. 1269, 1275 (N.D. Ill. 1990), *aff'd,* 968 F.2d 1269 (7th Cir. 1992).

Second, plaintiffs argue that the reference to government regulations in the reservation of rights clause creates ambiguity. They note, quite correctly, that similar language was found to be ambiguous in *Alexander.* In *Alexander,* the governing documents contained the following language:

> The company expects to continue this plan indefinitely, but necessarily reserves the right to amend, modify, or discontinue the plan in the future in conformity with applicable legislation.

967 F.2d at 92. This clause could have been read to mean that changes would be made only when necessary to conform to legislative changes. Plaintiffs urge that the same interpretation may apply to the Unisys clause. There is, however, an important difference between the clauses, namely that Unisys' reservation of rights clause states that the plan can be terminated for "any other reason." Consequently, the court holds that Unisys has unambiguously reserved its unilateral right to terminate the plan. Accordingly, the motion is granted with respect to the denial of benefits claims of the Unisys sub-class.

B. BURROUGHS PLAN DOCUMENTS

Burroughs' first post-ERISA summary plan description was issued to employees in 1977.[9] The summary plan descrip-

9. The Burroughs sub-class includes "[a]ll non-union retired, disabled and other eligible former employees and their spouses and dependents who as of November 3, 1992 were participants in or beneficiaries of the employee

tion was updated in 1983. Both the 1977 and 1983 versions contained the following reservation of rights language:

> The plan administrator may terminate, suspend, withdraw, amend or modify the plan in whole or in part *at any time,* subject to the applicable provisions of the group insurance policies.

Exhibit 6, Appendix in Support of Motion for Partial Summary Judgment. (emphasis in original). In 1985, Burroughs hired an independent contractor to administer its medical benefits plan. The new summary plan description stated that:

> While Burroughs does not presently plan to do so, it necessarily reserves the right to terminate or modify the plan *at any time,* which will result in the termination or modification of your coverage.

Exhibit 8, Appendix in Support of Motion for Partial Summary Judgment. (emphasis in original). The above language was in effect until January 1, 1993. In light of this language, it is clear that Unisys has not pulled Burroughs' amendment rights "out of the hat." *See* Transcript of Oral Argument at p. 44. In fact, Burroughs consistently reserved its statutory rights. Plaintiffs had the opportunity both in their briefs and at oral argument to identify ambiguity in the above language. They failed to do so. Instead, plaintiffs have produced voluminous amounts of extrinsic evidence to contradict the reservation of rights clauses. These informal communications (whether human resources bulletins, newsletters or internal memoranda) do not alter the terms of the written plan documents. *See Moore,* 856 F.2d at 492. Moreover, plaintiffs have not proffered a reasonable alternative construction of the plan documents. With respect to the Burroughs sub-class, plaintiffs reiterate their contention that the reservation of rights language can be read to apply only to active employees. The court rejects this argument because the plan documents simply

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welfare benefit plans pursuant to which Unisys or its predecessor, Burroughs Corporation, has provided medical benefits to former employees of Burroughs Corporation (or any division or unit thereof) who retired, became disabled or otherwise became eligible on or before May 1, 1989."

do not differentiate between active and retired employees. Consequently, the court finds that Burroughs unambiguously reserved the termination rights that Unisys now seeks to exercise. Accordingly, the motion is granted with respect to the denial of benefits claims of the Burroughs sub-class.

C. SPERRY PLAN DOCUMENTS

In 1984, Sperry introduced a comprehensive plan that covered all employees in its numerous unincorporated business groups.[10] The analysis of pre-1984 plan coverage is more complex because many of the business groups had different medical benefit plans. The reservation of rights language in the various summary plan descriptions is, however, quite consistent. Assuming, *arguendo,* that the reservation of rights clauses are unambiguous, the court must still address plaintiffs' back-up argument. Plaintiffs maintain that the Sperry plan documents are internally inconsistent insofar as they promise lifetime benefits but provide for their termination at any time.[11] For example, some of the Sperry plan documents contain the following language:

> When you retire . . . the comprehensive medical expense benefits then in force for you and your eligible dependents under this plan will be continued for the rest of your life.

Exhibit 144, Plaintiffs' Proposed Stipulations.

> When you retire . . . the Blue Cross and Blue Shield coverage then in force for you and your eligible dependents will be continued at no cost to you for the rest of your life.

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10. The Sperry sub-class includes "[a]ll non-union retired, disabled and other eligible former employees and their spouses and dependents who as of November 3, 1992 were participants in or beneficiaries of the employee welfare benefit plans pursuant to which Unisys or its predecessor, Sperry Corporation, has provided medical benefits to former employees of Sperry Corporation (or any division or unit thereof) who retired, became disabled or otherwise became eligible on or before April 1, 1989."

11. The plaintiffs in the Unisys and Burroughs sub-classes cannot avail themselves of this back-up argument because no similar language can be found in the documents that governed their benefits.

Exhibit 107, Plaintiffs' Proposed Stipulations. Because the Sperry summary plan descriptions contain promises of lifetime benefits and reservation of rights language, they are internally inconsistent.[12] Plaintiffs argue that this internal inconsistency renders the Sperry plan documents ambiguous.

Unisys' rejoinder is two-fold. First, Unisys asserts that the reservation of rights clauses must be read in a vacuum. The court rejects this argument because it flies in the face of the rule that plan documents are to be read as an integrated whole. *See Alexander,* 967 F.2d at 93. Second, Unisys argues that there is nothing inconsistent about saying, "you have lifetime benefits under the existing plan." In fact, Unisys points out that § 1022(b) requires it to describe the nature of benefits under an existing benefit plan. Unisys argues that it would be absurd to construe the reporting and disclosure provisions such that compliance with § 1022(b) triggers the vesting of otherwise non-vested benefits. The court finds Unisys' position unpersuasive. Unisys could have adequately described the health benefits without discussing "lifetime" benefits.

In *Musto,* 861 F.2d 897, the Sixth Circuit Court of Appeals arrived at the same legal conclusion that Unisys now advances. *Musto* involved a class of retirees that brought suit to block changes in their medical coverage. The district court issued a preliminary injunction restraining the employer from increasing the plaintiffs' insurance premiums. The district concluded that:

> The termination/modification clause contained in the summary plan descriptions clearly and expressly reserve[s] the right to amend and terminated the medical insurance benefit plan. At the same time, however, the

12. The parties have agreed that to simplify the remaining issues at trial, further sub-classes should be denominated. The parties should be prepared to explain exactly which documents control with respect to a particular group of Sperry retirees. For example, they will need to explain whether the benefits for a post-1984 Sperry/Vickers retiree are governed by both the Sperry/Vickers medical plan and the comprehensive Sperry medical plan that replaced it in 1984.

> plan descriptions also promise to continue the plans after the plaintiffs [have] retired, without further cost to the retiree. The Court cannot read both provisions together without reaching the conclusion that the provisions conflict and require interpretation of what the parties mutually intended by placing the terms in the agreement.

Musto, 615 F. Supp. 1483, 1499 (M.D. Tenn. 1985). The Sixth Circuit Court of Appeals reversed, holding that the district court had erred as a matter of law in concluding that the plan provisions were irreconcilable. The court noted that:

> To read this summary as saying that the plan can never be changed in such a way as to mandate retiree contributions for continued medical coverage is to read into the summary something its authors did not put there (*a promise to provide lifetime 'paid up' medical insurance*), while reading out of the summary something that clearly was put there (an express reservation of the right to change the plan).

Musto, 861 F.2d at 906 (emphasis added). This case is distinguishable from *Musto* because the authors of the Sperry plan documents did make a promise to provide lifetime benefits, albeit a promise that is inconsistent with the reservation of rights language.

Unisys also relies upon *Sprague v. General Motors Corp.,* 768 F. Supp. 605 (E.D. Mich. 1991), where the court held that the promise of lifetime health care coverage could be reconciled with reservation of rights language. The court explained as follows:

> These provisions effectively informed plaintiffs that GM's present policy was to pay the full cost of basic health care coverage during plaintiff's retirement, but that GM reserved the right to change that policy. To show that GM violated the plan when it instituted the 1988 changes, plaintiffs would have to show that GM effectively promised never to change the plan during plaintiff's retirement. I find no such promise in any of the plan docu-

> ments. Rather, I find that GM unambiguously reserved the right to change the plan, and thus did not agree in the general plan documents to provide salaried employees with vested health benefits.

Id. at 611. If controlling and/or persuasive, *Sprague* would foreclose any further analysis and dictate that Unisys' motion should be granted as to the denial of benefits claims of the Sperry sub-class. However, this court disagrees with the analysis in *Sprague.* The district court held that *Musto* and *Moore* compelled it to grant GM's motion. *Moore,* however, involved informal promises rather than promises contained in the formal plan documents. *Musto,* as discussed *supra,* involved plan documents that did not promise "lifetime" coverage.[13]

Plaintiffs rely on several collective bargaining cases which hold that a factual question as to the duration of benefits arises upon the expiration of a collective bargaining agreement that promises extended medical coverage. *See Wheelabrator,* 993 F.2d 603; *Stewart v. KHD Deutz of America, Corp.,* 980 F.2d 698 (11th Cir. 1993). Unisys asserts that these cases are unpersuasive outside the collective bargaining context. Federal labor policy (i.e., The Labor-Management Relations Act) "neither favors nor disfavors the vesting of retirees' health benefits." *Stewart,* 980 F.2d at 702. It is not clear, however, that this factor provides a principled basis upon which to distinguish collective bargaining cases from ERISA cases. ERISA, though it does not provide for automatic vesting of health benefits, does not express a clear preference for or against vesting. *Wheelabrator,* 993 F.2d at 605.

Once the court determines that a document is in fact ambiguous, it makes sense to apply different rules of construction. For example, plaintiffs urge that the doctrine of *contra*

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13. The presence of the words "life" and "lifetime" in the Sperry plan documents, and their absence from the Unisys and Burroughs plan documents is of particular importance. The written promise of "lifetime benefits" has powerful meaning to retiring employees; a meaning that cannot be ignored as Unisys urges.

proferentem should apply to ambiguous plan documents drafted solely by plan sponsors. A different interpretative presumption might apply in the collective bargaining context. It is important to remember, however, that the threshold inquiry is simply whether the document is ambiguous. There is no reason to think that determinations about ambiguity should be made differently with respect to collective bargaining agreements than to benefit plans.

In *Stewart,* the collective bargaining agreement provided for health benefits during retirement but also contained a duration clause, which stated that "[u]pon the expiration or termination of this Agreement, the Company shall have the right to continue the Plans covered herein or to amend, modify, suspend or discontinue the Plans." 980 F.2d at 701. The trial court found that the reservation of rights language was unambiguous and denied the plaintiffs' request for injunctive relief. The Eleventh Circuit reversed, holding that "[t]he two provisions cannot both be given full effect, and the contract's language does not establish which one should be qualified." *Id.* at 703. The Eleventh Circuit directed the trial court to consider extrinsic evidence when assessing the plaintiffs' likelihood of success. In this case, the court is also faced with provisions that cannot both be given full effect.

In *Wheelabrator,* the collective bargaining agreement conferred benefits that appeared to outlast the duration of the agreement. The district court granted summary judgment for the employer, finding no intention in the agreement to provide benefits for life at no cost. The Seventh Circuit Court of Appeals reversed, holding that the promise of continuing post-retirement benefits could plausibly be read to mean that retirees had vested benefits. 993 F.2d at 608. It is important to note that the *Wheelabrator* agreement, unlike the agreement in *Stewart* and the Sperry plan documents, did not contain reservation of rights language. A reservation clause would not have been superfluous even though the bargaining agreements expire automatically, because "sometimes . . . a contract creates entitlements that outlast it." *Wheelabrator,* 993 F.2d at 606. Thus, *Wheelabrator* is distinguishable insofar as the col-

lective bargaining agreement did not contain a reservation of rights clause. Nevertheless, the court finds *Wheelabrator* and *Stewart* persuasive insofar as they hold that internally inconsistent documents are ambiguous. This determination is consistent with *Moore,* 856 F.2d at 492-493. In *Moore,* the court held that *informal* promises of lifetime benefits do not alter the terms of a written plan document, but the court also held that "the use of language such as 'lifetime' or 'at no cost' [in plan documents] might conceivably create a triable issue of fact on a contract theory." *Id.* at 493. Plaintiffs have proffered extrinsic evidence which, if believed by the finder of fact, would establish that Sperry intended to confer vested medical benefits upon its employees. Consequently, the court finds the Sperry plan documents to be ambiguous. The motion is denied with respect to the denial of benefits claim of the Sperry sub-class.

IV. BREACH OF FIDUCIARY DUTY

Plaintiffs allege that Unisys is liable under 29 U.S.C. § 1109 for breaching its fiduciary duty as plan administrator. ERISA provides that plan participants may bring a civil action "for appropriate relief under [§ 1109]." 29 U.S.C. § 1132(a)(2). The breach of fiduciary duty claim has two components. First, plaintiffs challenge the termination of benefits itself. Second, plaintiffs argue that Unisys and its predecessors, acting through their agents, made oral misrepresentations about the duration of retiree medical coverage. The first component of the claim is clearly without merit. In *Hozier,* 908 F.2d at 1162, the Third Circuit Court of Appeals held that a decision to amend or terminate a welfare benefit plan is "unconstrained by the fiduciary duties that ERISA imposes on plan administration." *See also Senn,* 951 F.2d at 817-818; *Musto,* 861 F.2d at 912. A denial of benefits claim under § 1132(a)(1)(B) is the proper vehicle for such a challenge.[14]

14. Plaintiffs have not explained what damages flow from the alleged breach, insofar as the breach is conceptually distinct from the denial of ben-

The second component of plaintiffs' claim bears further scrutiny. Plan administrators breach their fiduciary duty when, in response to inquiries by plan participants, they make affirmative misrepresentations about changes in a benefit plan. *Fischer v. PECO,* 994 F.2d 130, 135 (3d Cir. 1993). The *Fischer* plaintiffs had retired just before the announcement of an early retirement sweetener, after having been assured that no such sweetener would be available. Plaintiffs conceded that the employer was not obligated to enhance pension benefits, but they contended that it "had an obligation under ERISA to tell the truth about such decisions when asked by plan participants." The district court found no evidence of material misrepresentations and granted summary judgment for the employer. The Third Circuit Court of Appeals reversed and remanded, holding that "[t]he content of the particular communications PECO allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact. . . ." *Id.* at 135. Plaintiffs assert that similar factual issues are raised by their misrepresentation claims.

If *Fischer* controlled, it would certainly preclude summary judgment in this case. The court, however, finds *Fischer* distinguishable. *Fischer* pertains to actual or contemplated changes in an existing plan, not the terms of an existing plan.[15] As discussed, *supra,* the contours of an existing benefit plan are defined exclusively in the written plan documents.[16] To apply *Fischer* in this context is, as a practical matter, to subvert

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efits itself. It is important to note that the remedies available under § 1109 and § 1132(a)(1)(B) are different.

15. Plaintiffs are not alleging that they were misled about the actual decision to terminate the existing plans. Their contention is that they were never informed that such a decision was permissible under terms of the plan. Plaintiffs advance this argument despite the presence of the reservation of rights language.

16. It is important to note that "ERISA does not impose a 'duty of clairvoyance' on fiduciaries." *Fischer,* 993 F.2d at 135. (citation omitted). To the extent that the alleged misrepresentations were simply erroneous predictions about the likelihood of plan termination, they do not constitute a breach of the fiduciary duty.

the well-established rule that informal communications do not alter the terms of the written plan documents. It would be imprudent to fashion a rule that further encourages plan participants to rely upon oral representations about the scope of their benefits plan. Rather, *Fischer* should be read narrowly to provide a remedy to persons who, due to their reliance upon an alleged misrepresentation, are not plan participants and by definition cannot proceed on a denial of benefits theory.[17]

In *Hozier,* the court held that plan administration does not encompass amendment decisions. 908 F.2d at 1161. Accordingly, the court concludes that the alleged oral misrepresentations about the possibility of amendments to the plan do not amount to a breach of fiduciary duty. The motion is granted with respect to all breach of fiduciary duty claims.

V. FEDERAL PREEMPTION

Congress intended that ERISA would completely preempt the field of employee benefit law. *Reichelt v. Emhart Corp.,* 921 F.2d 425 (2d Cir. 1990) (interpreting 29 U.S.C. § 1144(a)), *cert. denied,* 111 S. Ct. 2854 (1991). Section 1144(a) provides in pertinent part that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." Thus, plaintiffs' remaining claims survive only to the extent they are consistent with federal common law.

Plaintiffs seek relief on theories of promissory estoppel and equitable estoppel. In *Hozier,* the Third Circuit Court of Appeals limited the availability of estoppel claims under ERISA to cases involving "extraordinary circumstances." 908 F.2d at 1165 n.10; *see also Gridley v. Cleveland Pneumatic Co.,* 924 F.2d 1310 (3d Cir.) ("equitable estoppel is not available in ERISA cases absent 'extraordinary circumstances'), *cert. denied,* 111 S. Ct. 2856 (1991). There are no substantiated

17. The *Fischer* court relied heavily upon *Berlin v. Michigan Bell,* 858 F.2d 1154 (6th Cir. 1988). It is important to note that the plaintiffs in *Berlin* had retired just before a sweetener was offered.

allegations of fraud or bad faith on Unisys' part.[18] Furthermore, estoppel claims are available only when plan documents are adjudged ambiguous, *Alday,* 906 F.2d at 666, *and* the plaintiffs can show detrimental reliance. *Etherington,* 747 F. Supp. at 1281. As [the] court noted in *Etherington:*

> After all, the choice that would have confronted plaintiffs had they specifically been told about the situation that they now complain was left undisclosed was really a Hobson's choice from their perspective: They could have continued work as they did and ended up with the diminished benefits or they could have left their jobs and ended up with no benefits whatever. Hence even on the arguendo assumption that plaintiffs did rely on those asserted 'misrepresentations' in continuing to work for [their employer], no facts have been advanced that could support a reasonable inference that such reliance injured plaintiffs in any real way.

747 F. Supp. at 1281. Unlike the early retirees, who are not the subject of this motion, the retiree plaintiffs cannot demonstrate detrimental reliance. Accordingly, Unisys' motion is granted as to all estoppel claims.

VI. CONCLUSION

The Unisys and Burroughs summary plan descriptions contain uncontradicted and unambiguous reservation of rights language. The Sperry summary plan descriptions are internally inconsistent to the extent they contain reservation of rights language and guarantees of lifetime coverage. The

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18. In a post-argument letter brief, counsel for the Burroughs sub-class quotes the following from an affidavit of a class member/former Burroughs employee, as evidence of bad faith: "I know that retirees relied upon the above representations and the representations were important to them because in my meetings the retirees frequently asked for reassurance that Burroughs would continue to provide the no or low cost health benefits during their lifetimes. I specifically recall stating 'absolutely'. Further, I regarded and understood this benefit to be locked in upon retirement." Letter Brief at p. 5-6. This does not demonstrate bad faith conduct by Burroughs.

court must consider extrinsic evidence at trial to clarify this ambiguity in the Sperry plans. Accordingly, Unisys' motion is granted as to the denial of benefits claims advanced by the Unisys and Burroughs sub-classes, but denied as to the denial of benefits claims advanced by the Sperry sub-class.

Unisys' decision to change benefits plans is not constrained by ERISA's fiduciary duty provisions. Furthermore, alleged oral misrepresentations about the terms of the plans by agents of Unisys and its successors, in their capacity as plan administrators, do not constitute breaches of their fiduciary duty. Consequently, Unisys' motion is granted as to all breach of fiduciary duty claims.

Plaintiffs have failed to demonstrate that they relied to their detriment on oral and written representations of the plan administrators. Consequently, Unisys' motion is granted with respect to all estoppel claims. An appropriate order follows.

/s/ EDWARD N. CAHN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS CORPORATION RETIREE :
: MDL No. 969
MEDICAL BENEFITS ERISA LITIGATION:

ORDER

CAHN, C.J. October 13, 1993

AND NOW, this 13 day of October, 1993, upon consideration of Unisys' Motion for Partial Summary Judgment, IT IS ORDERED that the Motion is GRANTED in part and DENIED in part. Judgment is entered in favor of Unisys and against the retiree plaintiffs on the following claims:

1. The denial of benefits claims of the Unisys and Burroughs sub-classes;
2. All breach of fiduciary duty claims;
3. All estoppel claims.

The case will proceed on the Sperry sub-class' denial of benefits claims and all claims asserted by the early retiree plaintiffs.

BY THE COURT:

/s/ EDWARD N. CAHN
Edward N. Cahn, C.J.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEFORE:

THE HONORABLE EDWARD N. CAHN
UNITED STATES DISTRICT JUDGE

IN RE:

UNISYS MULTI-DISTRICT LITIGATION : NO. MDL 969

Allentown, Pennsylvania
July 5, 1994
1:30 o'clock p.m.

APPEARANCES:

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[2]

Audio Operator: Kris Dragotta
Transcribed by: Paula L. Curran

(Proceeding recorded by Electronic Sound Recording; transcript produced by computer-aided transcription service.)

[3]

(Whereupon the following occurred in open court at 1:30 o'clock p.m.)

THE COURT: Good afternoon, Counsel.

ALL COUNSEL: Good afternoon, your Honor.

THE COURT: I guess everybody is sufficiently irritated with our decision to be eager to exercise 1292B jurisdiction in the Appellate Courts or Rule 54B orders. We have your proposed orders. Let's just sit back a minute and see what the best way would be to proceed. Don't you think we should maybe quantify the equitable claims of the class members, of the class representatives and give the Court of Appeals a decision of the type of equitable relief that might be appropriate, if any.

MR. RODA: When you say quantify, your Honor, what do you mean?

THE COURT: Well, I mean my thinking is that monetary damages are out and that you can't back-door the strong language we quoted in the opinion about the reservation of rights clause trumping the lifetime language, by coming in with equitable relief in the nature of specific performance to reinstate the claims.

Now, I think that's the kind of thing that you'll want — that plaintiffs will want to take up to the Court of Appeals on 1292B, but we ought to come in — the plaintiffs are more imaginative that [*sic*] I am, at least they are paid to be **[4]**

* * * *

[33]

* * * *

MR. MILONE: Your point highlights the difficulty in this issue, your Honor. But at the same time that the participant is across the table from the counselor, the participant is holding a summary plan description that says there's a reservation of rights clause, you can hardly say there has been a misrepresentation, when you've given someone the information in the way Congress requires you to give it.

THE COURT: Sure. Well, if I don't think there was — I don't think this is a fraudulent misrepresentation. I don't think it came down this way that they handed them a contract and knowing — or handed them a documentation knowing that it wouldn't — that it wasn't right. They didn't know that it wasn't right. A lot of the people making these representations thought that they had lifetime benefits.

MR. MILONE: Exactly. Well, as long as your point is clear on the record and this is being transcribed, I take it, that you're —

THE COURT: Well, you don't have to agree. I can just —

MR. MILONE: — yes, you're correct.

THE COURT: — use their — I think their language goes too far when they say, we don't have to get into the highest level of company management. And systematically

[34]

informed. The opinion, I think, was carefully done and it sets forth what we found. Maybe we can say something like this. Company representatives made representations that medical benefits would continue for life, as detailed in the opinion.

MS. SISKIND: It's Pages 69 and 72 of the opinion that we took this language from.

THE COURT: Well, you can say as detailed —

MS. SISKIND: Yes.

THE COURT: — on Pages 69 and 72 of the opinion. But take out the, I don't think the court order should contain pejorative language that is going to, I mean, suppose Mr. Sandals brings in Attorney David Berger to argue the case and he becomes emotional over his language, the highest levels of — echelons of the company. And that's what Judge Cahn said. That's what defense doesn't want and they're right about that.

MS. SISKIND: I guess the concern was that those findings, in substance, were — went to the core of your conclusion on the issue.

THE COURT: Whatever those findings are, they are.

MS. SISKIND: Yes, they are there.

THE COURT: And you may argue that, but I don't think in this order it should — this order should not be your brief. Whatever pejorative language you want to put in **[35]**

* * * *

MR. SANDALS: Just as an advisory to the Court, we're hoping like many class action settlements, it's a fairly routine matter. But as you can imagine, there are a number of class members who believe they have a very strong case. And we can't rule out the possibility of objectors, so you may want to allot three to four hours. I hate to say that much, but I can't rule it out.

THE COURT: Okay. Do it. Anything else?

MR. SANDALS: That's all we have, your Honor.

THE COURT: Okay, have a pleasant summer.

ALL COUNSEL: Thank you, your Honor.

(Court adjourned 3:45 o'clock p.m.)

* * *

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ GERALDINE C. LAWS
Geraldine C. Laws
Laws Transcription Service

JULY 13, 1994
Date

/s/ PAULA L. CURRAN
Paula Curran

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS CORPORATION RETIREE MEDICAL BENEFITS ERISA LITIGATION	:	MDL NO. 969
THIS DOCUMENT RELATES TO: ALL ACTIONS BUT *MERCURE V. UNISYS CORP.*	:	

ORDER

CAHN, C.J. July 7, 1994

AND NOW THIS 7 day of July, 1994, IT IS ORDERED that the Court's Order of June 23, 1994 is amended to read as follows:

1. Judgment is entered in favor of Unisys and against the Sperry non-VERIP plaintiffs on the denial of benefits claim and the estoppel claim.

2. Judgment is entered in favor of Unisys and against the Unisys 1989 and 1991 VERIP plaintiffs on all of their claims.

3. The judgments entered in paragraphs 1 and 2 are hereby certified for immediate appeal pursuant to Rule 54(b), Fed. R. Civ. P., the Court expressly determining that there is no just reason for delay in any appeals from such judgments and the Clerk is expressly directed to enter such judgments. These judgments shall apply to and bind all plaintiff class members and all claims described therein, except that they do not encompass and are without prejudice to all claims based upon any individual written agreements settling or disposing of claims or disputes between any plaintiff class member and Unisys or its predecessors, or judgments or awards settling or resolving such claims or disputes.

4. The Court relies upon the following factors in making the certification pursuant to Rule 54(b), Fed. R. Civ. P. (1) All claims subject to the certification have been adjudicated to finality and there is no further action the Court can take with

respect to these claims. (2) All claims of the Unisys VERIP plaintiffs, and, except for the issues certified pursuant to 28 U.S.C. § 1292(b), all claims of the Sperry non-VERIP plaintiffs, which are susceptible to class adjudication have been adjudicated to finality. (3) There are no other claims remaining for adjudication in this Court except for an anticipated motion to reconsider the previous dismissal of the breach of fiduciary duty claims asserted by the Burroughs and Unisys non-VERIP plaintiffs, which claims the Court expects to certify for review following disposition of the motion, and proceedings under Rule 23(e), Fed. R. Civ. P., to consider approval of the proposed settlement of all claims of all Sperry and Burroughs VERIP plaintiffs. (4) There is no possibility that the need for review of the certified judgments might be mooted by future developments in this Court. (5) There is no apparent possibility that the Court of Appeals would be required to consider the same issues a second time in any later appeals. (6) There is no counterclaim or other claim which would result in a set-off against the judgments sought to be made final. (7) It is in the interest of all parties, and particularly the retiree plaintiffs who are of advanced age, that the judgments be reviewed as promptly as possible and not be delayed until final adjudication of the breach of fiduciary duty claim which is being certified for review pursuant to 28 U.S.C. § 1292(b). The Rule 54(b) certifications will enable the Court of Appeals to review and decide together all claims of all non-settling parties.

5. The Sperry Plaintiffs' motion for reconsideration of their Breach of Fiduciary Duty Claim is GRANTED and the plaintiffs may proceed on this theory.

6. The Court determines that paragraph 5 of this order involves controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from that portion of the order may materially advance the ultimate termination of the litigation. The retiree class members are of advanced age and would be prejudiced by any delay in review, and the issues raised by this certification are discrete and controlling.

7. The Court hereby certifies for immediate appeal the following controlling questions of law pursuant to 28 U.S.C. § 1292(b):

(a) May a breach of fiduciary duty claim be maintained under ERISA where:

(1) the applicable summary plan descriptions ("SPDs") informed class members that the duration of retiree medical benefits was for life, but reservation clauses in the SPDs stated that the company reserved the right to terminate the plans at any time and for any reason; and

(2) company representatives misinformed class members that once they retired, their medical benefits would continue for life, as detailed in the Court's opinion of June 23, 1994?

(b) Assuming that a breach of fiduciary duty claim may be maintained under the above circumstances, is equitable relief available to individual participants under ERISA?

8. All other outstanding motions are DENIED as moot.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn, C.J.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 8, 1994
#D-10

No. 94-8051

IN RE UNISYS CORPORATION RETIREE
MEDICAL BENEFITS ERISA LITIGATION
(MDL No. 969 (ENC))

Present: GREENBERG, NYGAARD and LEWIS, *Circuit Judges.*

Petition for permission to appeal pursuant to 28 USC Section 1292(b).

/s/ MARY ARNOLD
Mary Arnold 597-5019
Deputy Clerk

ORDER

The foregoing motion is granted.

By the Court,

/s/ MORTON I. GREENBERG
Circuit Judge

Dated: August 23, 1994
[DATE STAMP]

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: UNISYS CORPORATION RETIREE MEDICAL BENEFITS ERISA LITIGATION	MDL Docket No. 969
This Document Relates to: *Romano* No. 92-CV-6938 *Mercure* No. 93-CV-3838 *Bennett* No. 93-CV-1668	

ORDER

CAHN, C.J. September ___, 1994

AND NOW THIS 6th day of September, 1994, IT IS ORDERED that:

1. Judgment is entered in favor of Unisys and against the Burroughs and Unisys non-VERIP plaintiffs on their denial of benefits claim and estoppel claim.

2. The judgment entered in paragraph 1 is hereby certified for immediate appeal pursuant to Rule 54(b), Fed. R. Civ. P., the Court expressly determining that there is no just reason for delay in any appeals from such judgments and the Clerk is expressly directed to enter such judgments. These judgments shall apply to and bind all plaintiff class members and all claims described therein, except that they do not encompass and are without prejudice to all claims based upon any individual written agreements settling or disposing of claims or disputes between any plaintiff class member and Unisys or its predecessors, or judgments or awards settling or resolving such claims or disputes.

3. The Court relies upon the following factors in making the certification pursuant to Rule 54(b), Fed. R. Civ. P. (1) All claims subject to the certification have been adjudicated to finality and there is no further action the Court can take with respect to these claims. (2) All claims of all plaintiffs in

these actions, except for the issues certified pursuant to 28 U.S.C. § 1292(b) and except as described in paragraph 4 of this Order, that are susceptible to class adjudication have been adjudicated to finality. (3) There are no other claims remaining for adjudication in this Court except as described in paragraph 4 of this Order and except for proceedings under Rule 23(e), Fed. R. Civ. P., to consider approval of the proposed settlement of all claims of all Sperry and Burroughs VERIP plaintiffs. (4) There is no possibility that the need for review of the certified judgments might be mooted by future developments in this Court. (5) There is no apparent possibility that the Court of Appeals would be required to consider the same issues a second time in any later appeals. (6) There is no counterclaim or other claim which would result in a set-off against the judgments sought to be made final. (7) It is in the interest of all parties, and particularly the retiree plaintiffs who are of advanced age, that the judgments be reviewed as promptly as possible and not be delayed until final adjudication of the breach of fiduciary duty claims which are either being certified for review pursuant to 28 U.S.C. § 1292(b) or handled as described in paragraph 4 of this Order. The Rule 54(b) certifications will enable the Court of Appeals to review and decide together all but the claims described in paragraph 4 of this Order of all non-settling parties.

4. Upon review of the Burroughs and Unisys non-VERIP plaintiffs' motion for reconsideration of their breach of fiduciary duty claims, defendant's opposition thereto, and following a conference call with counsel for the interested parties, it is determined that the motion shall be held in abeyance pending the Court of Appeals' disposition of the appeal certified under Section 1292(b) relating to the breach of fiduciary

duty claims of the Sperry regular non-VERIP plaintiffs, permission for which appeal was granted by the Court of Appeals on August 8, 1994. The Court hereby confirms that it has not certified for appeal pursuant to Rule 54(b), Fed.R.Civ.P., its October 13, 1993 Order granting summary judgment in favor of Unisys on the breach of fiduciary duty claims brought by the Burroughs and Unisys non-VERIP plaintiffs.

BY THE COURT:

/s/ EDWARD N. CAHN
Edward N. Cahn, C.J.

APPENDIX I

Filed June 28, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1800

IN RE: UNISYS CORP. RETIREE
MEDICAL BENEFIT "ERISA" LITIGATION

*Gerald E. Pickering, Fred Tonnies, William Leonhardt, Evelyn Schmidt, Dudley Keyes, David Kahl, Paul Wright, Robert Wilt, Clay Bernichon, Edward Valle, Robert B. Welsh, Solveig Tschann, Bernard J. Jansen, Donald I. Klippenstein, Frederick W. Hoppe, Ludson F. Worsham, Edwin Marjala and Warren Hall, individually and on behalf of all members of the Sperry Class previously certified by the Court whose claims have not been settled,
Appellants

*(Pursuant to F.R.A.P. 12(a))

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. MDL 969)

Argued:
May 4, 1995

Before: MANSMANN, SCIRICA and McKEE,
Circuit Judges.

(Filed: June 28, 1995)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This class action arises out of the termination of post-retirement medical benefit plans, sponsored by Unisys for retirees and disabled former employees of Unisys and its corporate predecessors, Sperry Corporation and Burroughs Corporation. The retirees seek to recover post-retirement medical benefits under the terms of their welfare benefit plans and under the Employee Retirement Income Security Act's ("ERISA's") provisions for appropriate equitable relief.

We are asked to decide in this particular appeal[1] whether the district court erred in holding, on this breach of contract claim, that summary plan descriptions that used the terms "lifetime" or "for life" to describe the duration of medical benefits, while at the same time reserving the employer's right

1. This appeal concerns some of the claims of the Sperry regular retirees, and the claims of a sub-group of Sperry early retirees.

The appeals docketed at Nos. 94-1801, 94-1875, 94-1912 and 94-2216 [*sic*] concern the claims of the Unisys and Burroughs retirees, as well as the remaining claims of the Sperry retirees. In appeal No. 94-1801, the Unisys early retirees have appealed from an adverse judgment rendered after trial on their claims for breach of contract, breach of fiduciary duty and estoppel. The claims of the Burroughs early retirees and many of the claims of the Sperry early retirees were settled pursuant to a partial settlement agreement between Unisys and these retirees. In appeal No. 94-1875, Unisys has appealed from an order of the district court reinstating the Sperry retirees' claims for breach of fiduciary duty. In appeal No. 94-1912, the Burroughs and Unisys regular retirees have appealed from the district court's grant of summary judgment in favor of Unisys on their breach of contract and estoppel claims. In appeal No. 94-2166, a sub-group of Sperry retirees attempted to challenge the partial settlement between Unisys and the Sperry and Burroughs early retirees which did not include them.

On October 3, 1994 we granted the parties' joint motion to consolidate appeal Nos. 94-1800, 94-1801, 94-1875 and 94-1912 for purposes of filing a single joint appendix and for disposition. All of these appeals have now been resolved, either by our decisions in published opinions *see* Nos. 94-1800 and 94-1875, or by memorandum opinions rendered in Nos. 94-1801, 94-1912 and 94-2216 [*sic*].

to modify or terminate at "any time" and "for any reason" the plans under which these benefits are provided, were unambiguous. We also address whether the district court erred in refusing to reinstate the retirees' estoppel claims upon which Unisys had earlier been granted summary judgment. We will affirm the judgment of the district court.

I.

In September of 1986, Sperry Corporation and Burroughs Corporation merged to form Unisys Corporation. Prior to the merger, Sperry consisted of a number of business units or divisions. Until 1984 each Sperry division maintained its own medical benefits program, with each described in a separate summary plan description. In 1984, in an attempt to streamline the medical benefits plans and in response to rising medical costs, Sperry implemented Medflex, a corporate-wide medical benefits plan that applied to the entire Sperry Corporation.[2] Medflex was applied to future retirees only; existing retirees continued to receive coverage under the pre-Medflex plans which applied when they retired.

Following the merger in 1986, Unisys continued the Medflex plan for active employees and for those who retired after its implementation but prior to April 2, 1989. Unisys also continued all of the pre-Medflex plans for those who retired prior to Medflex's implementation.[3] In 1989, Unisys effected the consolidation of its retiree medical benefit plans when it created the Unisys Post-Retirement and Extended Disability

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2. Medflex applied to all Sperry business units by January 1, 1984, with the exception of one sub-group of the Sperry Division, which commenced participation in Medflex on January 1, 1985.

3. Following the merger, Unisys maintained all of the separate medical benefit plans for its retirees — approximately 75 plans, a situation described by one Unisys executive as a "royal administrative headache." This abundance of plans was due primarily to Sperry's corporate structure which consisted of several business units or divisions, with each division having its own medical plan. Further, the district court found that even in a single Sperry division, several plans often existed due to the company's practice of maintaining the plan under which an individual retired and implementing new plans prospectively only.

Medical Plan to cover all employees who retired after April 1, 1989, most of whom were former Sperry and Burroughs employees.

On November 3, 1992, Unisys publicly announced that effective January 1, 1993, it was terminating all existing medical benefit plans and replacing all of the pre-existing medical plans with the new Unisys Post-Retirement and Extended Medical Disability Plan. Under the new plan, retirees would be responsible for increasing levels of contributions until January 1, 1995, when they would have to pay the full cost of their premiums. Thus, the new plan sharply contrasted with earlier plans, under the majority of which Unisys paid the entire premium for an individual's life and provided benefits for the individual's spouse as well.[4]

The appellees in this case are former employees of Sperry Corporation (and their eligible dependents) who retired between 1969 and April 1, 1989, from Sperry Corporation or Unisys, Sperry's successor. Following Unisys' termination of their post-retirement medical benefit plans in late 1992, the retirees sought relief based on three theories: breach of contract, equitable estoppel, and breach of fiduciary duty. The Sperry retirees argued that Unisys' termination of their

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4. Unisys' decision to teminate the benefit plans under which it had provided coverage and to replace those plans with the new Unisys Post Retirement and Extended Disability Medical Plan was challenged in nine separate actions which the Judicial Panel on Multidistrict Litigation transferred to the Eastern District of Pennsylvania and consolidated for disposition pursuant to 28 U.S.C. § 1407. On June 9, 1993, after determining that Unisys "acted on grounds generally applicable to the class," the district court certified the case as a class action pursuant to Fed. R. Civ. P.23(b)(2). The class consists of approximately 21,000 former non-union employees of Sperry, Burroughs and Unisys. The court certified three distinct classes: Unisys retirees, Sperry retirees or Burroughs retirees. The claims of each class were adjudicated separately.

The retirees asserted two sets of claims: general claims on behalf of all retirees, and separate claims on behalf of "early" retirees who retired under various early retirement incentive programs offered by the company throughout the 1980s. Many of the claims of the early retirees were settled after trial, but not the claims of a subgroup of Sperry early retirees denominated as VRIFs, who are part of this appeal. *See also* appeal No. 94-2166.

respective medical plans violated ERISA. They argued first that Unisys had denied them "vested" benefits in violation of 29 U.S.C. § 1132(a)(1)(B) because the summary plan descriptions ("SPDs") explaining their medical benefits contained the term "lifetime" benefits. Regarding their contract claims, the retirees relied on the explicit lifetime language in the plans, *e.g.*, "when you retire, your medical benefit will be continued for the rest of your life", and on statements made by the company both orally and in writing to the same effect.[5]

The Medflex SPD is illustrative. A Sperry employee who retired during the period January 1, 1984 through April 1, 1989 received medical benefits under this plan. The SPD for Medflex is set forth in a booklet titled, "Your Company and You." Included in this plan was the following description of retiree medical benefit coverage:

> If you're eligible, Medical Plan benefits continue without cost after you terminate active employment. Benefits also may continue on a contributory basis for your eligible dependents who are covered when your employment terminated.... Coverage *continues for you for life* and for your dependents while they remain eligible provided you don't stop the contributions for their coverage. After your death, your eligible dependents may continue coverage by making the require contributions. Their coverage continues until your spouse dies or remarries.

(A 2227) (emphasis added).

The retirees argued alternatively, that even if the court were to find that "lifetime" is not synonymous with "vested", the evidence established that Unisys intended that a reservation of rights clause in the plan, enabling the company to

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5. A subgroup of Sperry retirees who retired pursuant to a voluntary reduction in force asserted a separate contract claim of their own that the company had induced them to retire earlier than they would have done by representing that if they retired, they would preserve the post-retirement coverage in effect under then current plans. These "VRIF" retirees argued that they accepted Unisys' "offer" by retiring early, thus forming separate bilateral contracts.

change the plan at will, only applied to active employees and not to retirees; thus, the company never intended to reserve its right to terminate the plans as far as retirees are concerned. In addition, the retirees contended that Unisys breached its fiduciary duty by systematically misrepresenting the plans and should be equitably estopped from exercising any right to terminate their benefits.[6]

Unisys responded that it had indeed reserved the right to terminate the retirees' medical plans due to the "reservation of rights clauses" or "RORs" located in other sections of the plans. Typical of these clauses is the one set forth in the SPD describing the Medflex plan. The Medflex SPD booklet, "Your Company and You," was distributed to all employees and contained the following reservation of rights clause:

> Plan Continuation
>
> The Company expects to continue the Plans, but *reserves the right to change or end them at any time.* The Company's decision to change or end the Plan may be due to changes in federal or state laws governing welfare or retirement benefits, the requirements of the IRS or ERISA, the provisions of a contract or policy involving an insurance company *or any other reason* . . . .

(A 2750) (emphasis added).

In addition to the provisions set forth in the summary plan descriptions, information about retiree medical benefits was also conveyed to the Sperry retirees through various informal oral and written communications. As in the summary plan descriptions, the duration of medical benefits was described as being "for life" or for the "lifetime" of the retiree and spouse. Sperry did not include in these informal communications a reference to the reservation of rights clause.

Notwithstanding these communications, Unisys denied having created vested medical benefits through its use of the words "lifetime" or "for life", and early in the litigation filed a

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6. The Sperry retirees' breach of fiduciary claim is not implicated in this appeal. It is the subject of the appeal docketed at 94-1875.

motion for summary judgment seeking dismissal of all of the regular retirees' claims based on the unambiguous reservation of rights clauses in the plans. Although the district court granted Unisys' motion on the retirees' breach of fiduciary duty and estoppel claims, it denied summary judgment on the retirees' contract or plan-based claim. The district court initially found that the internal inconsistency between the lifetime promises and the reservations of rights clauses made the plans ambiguous and thus a trial on the extrinsic evidence was necessary to resolve the ambiguity. *In re Unisys,* 837 F. Supp. 670, 679 (E.D. Pa. 1993). After trial,[7] the district court reversed its position on both the contract and breach of fiduciary duty claims, entering judgment against the Sperry regular and VRIF retirees on their contract claims but reinstating the Sperry retirees' breach of fiduciary claim.[8]

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

A.

ERISA is a comprehensive statute enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 90 (1983), and "to protect contractually defined benefits," *Massachusetts Mutual Life Ins. v. Russell,* 473 U.S. 134, 148 (1985).

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7. Although the retirees have also appealed from the district court's order striking their demand for a jury trial, we need not address this issue on appeal given our disposition of the contract ambiguity issue.

8. On October 13, 1993, the district court granted summary judgment in favor of Unisys on the Sperry retirees' claim that Unisys had breached its fiduciary duty. *In re Unisys,* 837 F. Supp. at 670, 679-80. At trial, the Sperry retirees moved for reconsideration of their breach of fiduciary duty claim in light of our decision, rendered during trial, in *Bixler v. Central Pa. Teamsters Health and Welfare Fund,* in which we held that a direct action for breach of fiduciary duty is available under section 1132(a)(3)(B). 12 F.3d 1292 (3d Cir. 1994). Relying on *Bixler,* the district court granted this motion and reinstated the Sperry retirees' claims for breach of fiduciary duty.

See also 29 U.S.C. § 1001. ERISA recognizes two types of employee benefit plans: pension plans and welfare plans. *Deibler v. Local Union 23,* 973 F.2d 206, 209 (3d Cir. 1992). In general, welfare plans provide "medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . ." 29 U.S.C. § 1002(1). Pension plans provide: (i) retirement income to employees or (ii) result in a deferral of income by employees for periods extending to the termination of covered employment or beyond. 29 U.S.C. § 1002(2)(A). Both Unisys and the retirees agree that the retiree medical benefit plans at issue in this case are welfare benefit plans under 29 U.S.C. § 1002(1).

The implications of this are significant. Although ERISA contains elaborate vesting requirements for pension plans, ERISA does not require automatic vesting of welfare benefit plans. *Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90, 95 (3d Cir. 1992); *Smith v. Hartford Ins. Co.,* 6 F.3d at 136 (3d Cir. 1994). Congress did not impose vesting requirements on welfare plans because it determined that "[t]o require the vesting of those ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." *Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155, 1160 (3d Cir. 1990) (citing H.Rep. No. 807, 93rd Congr., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726). In rejecting the automatic vesting of welfare plans, Congress evidenced its recognition of the need for flexibility with regard to an employer's right to change medical plans. As the Court of Appeals for the Second Circuit observed:

> Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of infla-

> tion. These unstable variables prevent accurate prediction of future needs and costs.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). *See also* 29 U.S.C. § 1051.

Nonetheless, in some situations, a welfare plan may provide a vested benefit. *Alexander, supra,* 967 F.2d at 95; *Schoonejongen v. Curtiss-Wright,* 18 F.3d 1034, 1042 (3d Cir. 1994), *rev'd and remanded on other grounds,* __ U.S. __, 115 S. Ct. 1223 (1995). The plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the welfare benefits to be vested. *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990).

ERISA's framework ensures that employee benefit plans be governed by written documents and summary plans descriptions, which are the statutorily established means of informing participants and beneficiaries of the terms of their plan and its benefits. *See, e.g., Hozier v. Midwest Fasteners, Inc., supra; Confer v. Custom Engineering Co.*, 952 F.2d 41 (3d Cir. 1991); *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74 (3d Cir. 1991), *cert. denied,* 112 S. Ct. 1479 (1992); 29 U.S.C. § 1022(a)(1). Accordingly, any retiree's right to lifetime medical benefits under a plan can only be found if it is established by the terms of the ERISA-governed employee benefit plan.

A court must examine the plan documents. *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993). Extra-ERISA commitments, such as the right to receive free lifetime coverage, must be found in the plan documents and stated in clear and express language. *Wise v. El Paso Natural Gas,* 986 F.2d 929 (5th Cir.), *cert. denied,* 114 S. Ct. 196 (1993). *See also Alday v. Container Corp. of America,* 906 F.2d 660, 665 (11th Cir. 1990) ("[A]ny retiree's right to lifetime medical benefits at a particular cost can only be found if it is established under the terms of the Erisa-governed benefit plan document"), *cert. denied,* 498 U.S. 1026 (1991). The written terms of the plan documents control and cannot be modified or superseded by the employer's oral undertakings. *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d at 1163 (citing

Musto v. American General Corp., 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied,* 490 U.S. 1020 (1989) (the unambiguous written provisions of a plan must control, and extrinsic evidence may not be introduced to vary the express terms of a plan)) and *Gordon v. Barnes Pumps Inc.*, 999 F.2d 133, 137 (6th Cir. 1993) (a basic principle of ERISA is that a plan may not be modified or superseded by oral statements or other extrinsic evidence).

To determine whether Sperry intended to confer vested benefits upon its retirees in this case, we must analyze the provisions of the retiree medical benefit plans at issue. Unisys and the Sperry retirees agree that the Sperry summary plan descriptions are the controlling documents that we must interpret. The threshold issue in this case, whether the Sperry plans were ambiguous, is a question of law. *Taylor v. Continental Group,* 933 F.2d 1227, 1232 (3d Cir. 1991). We turn now to the exact language of the plans in question and apply these principles of law.

B.

Although Sperry maintained many different medical benefit plans for its separate divisions or business groups, all of these plans conveyed the same message: that post-retirement medical benefits would be provided for life. There were slight variations in the exact language utilized to convey this message. For instance, the Sperry Univac plan contained the following language:

> When you retire . . . the comprehensive medical expense benefits then in force for you and your eligible dependents under this plan will be continued for the rest of your life.

SPD for Sperry Univac (A 2232). Another plan provided: ". . . coverage continues for you for life and for your dependents while they remain eligible . . . ." Sperry Medflex SPD (A 2749).

Unisys offered the same defense for all Sperry divisions, namely that this lifetime language was subject to reservation

of rights clauses located elsewhere in the plans. Although some reservation of rights clauses were more detailed than others, each clause provided that the company could terminate the plan "at any time" and "for any . . . reason." *See* Sperry Medflex Plan, A 2750. Based on these provisions, the retirees asserted that the retiree medical benefit plans were ambiguous and that the ambiguity arose not merely from the reservation of rights clauses themselves, but also from the inconsistency between the reservation of rights clauses and the plan's lifetime promises. According to the retirees, the plans were ambiguous because they were susceptible to either of two interpretations: the retirees' interpretation that the lifetime language limited the scope of the reservations of rights, or the company's interpretation that the reservation of rights limited the lifetime language. If the court finds "but one reasonable interpretation, then *a fortiori* there can be no ambiguity." *Curcio v. John Hancock Life Ins. Co.*, 33 F.3d 226, 231 (3d Cir. 1994). However, if the language is susceptible to more than one reasonable interpretation, then it will be found to be ambiguous. *Id.*[9]

In *Schoonejongen v. Curtiss-Wright, supra,* we reviewed summary plan descriptions which stated in varying forms that health insurance benefits would terminate "upon death" or when "you cease to be a member of a class eligible for insurance . . . [or] upon discontinuance of the group policy." 18 F.2d at 1036-37. Some years later, Curtiss-Wright amended the language in its summary plan description to provide that "[c]overage under this plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired." *Id.* at 1037. The affected retirees argued that this reservation on its face referred only to employees and not to retirees. Because the reservation did

9. Although the district court originally agreed, at the summary judgment stage, that the presence of lifetime language and the reservation of the right to end the plans at any time made the plans "internally inconsistent," and therefore, ambiguous, it subsequently reversed this position in light of our decision in *Curtiss-Wright,* 18 F.2d at 1042, which the court interpreted as suggesting that "there is nothing inconsistent about having lifetime language and a ROR in the same documents."

not unambiguously reserve the right to terminate *retiree* benefits, the district court held a trial to resolve the ambiguity. 18 F.3d at 1041. Based on the extrinsic evidence, the district court found that the clause did apply to retirees. We affirmed the district court's holding that Curtiss-Wright had reserved the right to terminate retiree benefits, but held that Curtiss-Wright lacked a formal amendment procedure in violation of section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), and therefore the amendment to the plan was invalid. We responded to the retirees' argument that the plan's description of the duration of benefits as ceasing "upon death" created vested benefits:

> It seems to us, however that our conclusion [that Curtiss-Wright had a reserved right to amend] is a complete answer to this argument. *Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for so long as Curtiss-Wright maintained a post-retirement health insurance program, the general reserved right to amend the terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment.*

Curtiss-Wright, 18 F.3d at 1042 (emphasis added). Although the Supreme Court reversed our conclusion that a formal amendment procedure was lacking under section 402(b)(3) of ERISA, the Court's decision is consistent with our conclusion that Curtiss-Wright had expressly reserved the right to amend its plan to effect a termination of benefits under the plan, as well as our conclusion that "an important and proper purpose of reserving a general right to amend is to permit the conditioning or cessation of any participant's benefits, not vested by virtue of the mandate of ERISA, in ways not originally foreseen in order to meet unanticipated changes of circumstance." *Id.*[10]

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10. In *Curtiss-Wright*, ___ U.S. ___, 115 S. Ct. 1223 (1995), the issue of enforcing a reservation of rights clause notwithstanding "lifetime" assurances was not before the Supreme Court.

We agree with the district court that the fact that the Sperry plans used terms such as "lifetime" or "for life" to describe the duration of retiree medical benefits, while at the same time expressly reserving the company's right to terminate the plans under which those benefits were provided, did not render the plans "internally inconsistent" and therefore ambiguous here.[11] An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist. In this case, the Sperry retirees' eligibility for benefits was qualified because it was subject to Unisys' reserved right to terminate the plan under which those benefits were provided.[12]

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11. We do not hold that a reservation of rights will always prevail over a promise of benefits. Due to the abundance of ERISA plans and the differing benefits these plans provide, each case must be considered fact specific and the court must make its determination of the benefits provided based on the language of the particular plan it has been called upon to review.

For instance, in *Curtiss-Wright, supra,* the district court required extrinsic evidence in order to determine that the reservation clause in that case "was a general right to amend any or all" provisions of the plan. 18 F.3d at 1041, 1042 n.6. Thus, we held there that the reservation of rights clause overcame or "trumped" the promise of lifetime benefits.

Thus, *Curtiss-Wright* contemplated situations in which a reservation of rights in the plan documents are ambiguous. Where, as here, however, the reservation of rights is broad and unequivocal, it will prevail over a promise of lifetime benefits. Thus we agree with the district court's conclusion that the presence of lifetime language and the reservation of rights clauses here did not necessarily render the Sperry retiree medical benefit plans ambiguous.

12. The Sperry retirees argued that "the *Curtiss-Wright* panel did not consider the specific issue of whether an *unqualified* statement of lifetime benefits can limit the scope of a ROR." They maintain that the promise of lifetime benefits in *Curtiss-Wright* was expressly qualified by the phrase "so long as CW maintained a post-retirement health insurance program." *See* 18 F.3d at 1042. Here they suggest that the promise of lifetime benefits were, in contrast, completely unqualified. *See* A 2276. Thus, the Sperry retirees argue that the *Curtiss-Wright* case is distinguishable from theirs.

Other courts have reached the same conclusion, recognizing that an employer can qualify the provision of "lifetime" benefits by reserving the right to terminate the plan under which those benefits are provided. Thus, in *DeGeare v. Alpha Portland Indus., Inc.*, 652 F. Supp. 946 (E.D. Mo. 1986), *aff'd*, 837 F.2d 812 (8th Cir. 1988), *vacated and remanded on other grounds*, 489 U.S. 1049 (1989), the court found that seemingly inconsistent provisions, such as those permitting modification of the plan and those indicating that benefits last for life, must be construed to be harmonious. The court specifically found "harmonious and reasonable the interpretation of [the employer] of the written documents to provide lifetime benefits subject to [the employer's] reserved right to amend." 652 F. Supp. at 961. *See also Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1518 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) (plaintiffs did not meet their burden of proving vested welfare benefits where an employer promised to provide welfare benefits "until death of retiree" where the employer had expressly reserved the right to terminate or amend the plan); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (where summary plan description also clearly provided that retiree health insurance could be terminated or modified, terms of description were controlling); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 856 (4th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1442 (1995) (company's express reservation of its right to modify or terminate the participants' benefits is plainly inconsistent with any alleged intent to vest those benefits).

Here Sperry, and later Unisys, stated clearly and unequivocally in their summary plan descriptions that the company reserved the right to "change or end [the plans]" "at any time" and for "any . . . reason." Due to this broad and unambiguous language, we hold that the district court did not err when it concluded that the Sperry retiree medical benefit

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We disagree. Here, too, the promise made to retirees was a qualified one: the promise that retiree medical benefits were for life provided the company chose not to terminate the plans, pursuant to clauses which preserved the company's right to end them at any time or for any reason.

plans were not internally inconsistent because they contained "lifetime" language but also reserved the right to terminate benefits at any time.

C.

Notwithstanding its legal conclusion based on *Curtiss-Wright* that the Sperry plans unambiguously reserved Unisys' right to terminate its retiree medical benefit plans, the district court analyzed the extrinsic evidence in order to determine whether the company intended the reservation of rights to apply to the retirees' medical benefits.[13] Given the retirees' concerns that *Curtiss-Wright* did not foreclose the inquiry into extrinsic evidence, and because a trial had already been held in the case, the district court made a factual determination that the reservation of rights clause was intended to apply to the retirees' medical benefits, as well as a legal determination that the retirees had not sustained their burden of proving that the employer intended to vest retiree benefits.

The district court analyzed, first, the extrinsic evidence with respect to the intent of the plan sponsor, Unisys. Although the retirees argued that when the company used the term "lifetime," its true intent was to vest benefits, the district court found that the use of the word "lifetime" did not manifest an intent on the part of the plan sponsor to create "vested" benefits, because the evidence did not support this argument. The district court concluded that because the company had used the word "vested" in its medical plan for its top level Sperry executives, but not in the rank and file plans, the company must have intended *not* to vest the rank and file benefits. Rather, as the language of the executive plan revealed, when the company wanted to create vested benefits, it knew how to do so.[14]

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13. In *Alexander v. Primerica*, 967 F.2d at 93, we held that where there is an ambiguous ERISA plan, a court may consider, *inter alia*, the intent of the plan's sponsor, the reasonable understanding of the beneficiaries, and past practice in interpreting the plan. Accordingly, the district court heard the retirees' evidence presented on each of these subjects.

14. The district court further found that the retirees had conceded, throughout trial, that an active employee's benefits could always be

The district court also found that the retirees' assertion that the reservation of rights, which did not facially distinguish between actives and retirees, applied only to actives was not supported by a preponderance of the evidence. (A 2278-79). While the court found that the company had "locked in" retirees' benefits in practice in the past, it was "not persuaded" that the company had embraced the "active/retiree" distinction as a matter of actual policy due to the fact that not a single document corroborated the testimony that an active/retiree distinction was in force; the distinction was not incorporated into the reservation of rights or summary plan descriptions or reduced to writing as an official policy. (A 2278-80). The district court found significant the facts that the alleged policy of restricting the RORs to active employees had never been formally discussed by the Board of Directors, and that a board resolution did not exist confirming the creation of this policy. *Id.* We agree with the district court that all of these factors militate against the idea that Unisys intended to restrict the application of the RORs to active employees.

Numerous retirees testified at trial that they understood that their benefits could not be reduced after retirement. Indeed, the district court found that there was "no question that the defendant routinely spoke of the medical benefits as continuing 'for life.'" (A 2281). The district court specifically found that "this message was conveyed time and time again through informal communications that were sent out to retirees, and by oral statements that were made to these individuals both at private exist [*sic*] interviews and in group retirement sessions. *Id.* Nonetheless, the district court concluded that the retirees' reasonable understanding of their benefits must be limited to the reasonable understanding of the summary plan descriptions or plan documents, due to our strong precedent which precludes informal amendments to

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amended or terminated even though lifetime language was similarly used to describe that benefit. This concession suggested to the court that the retirees implicitly recognized that "lifetime" was *not* synonymous with "vested." (A 2278).

ERISA benefit plans. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d at 1164; *Haberen v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Program [sic]*, 24 F.3d 1491 (3d Cir. 1994) (and cases cited therein).

Finally, the retirees' submitted evidence of past practice which demonstrated that Sperry had never reduced retiree medical benefits prior to this litigation. For example, when the Medflex plan was implemented, it applied to future retirees only. The retirees argued that this evidence established the existence of a policy pursuant to which benefits were "locked-in" upon retirement. The district court found that "merely because the company had never chosen to exercise its reservations of rights prior to this litigation, did not mean that the company had waived its right to terminate the plans pursuant to these broad and unequivocal reservation of rights clauses." (A 2283) (citing *Alexander*, 967 F.2d at 93 (rejecting the defendant's argument that the company's past practice of changing benefits rendered the amendment clause unambiguous); and *Howe v. Varity Corp.*, 896 F.2d at 1116 ("merely because defendants chose to exempt retirees from plan changes in the past does not mean that defendants considered themselves forever bound to do so")).

Because the record before us firmly supports all of these findings, we cannot say that they are clearly erroneous.[15] Therefore, the district court did not err in concluding that the reservation of rights applied to the Sperry retirees' medical benefits and that the retirees' medical benefits were not intended by the company to be vested based upon this evidence.[16]

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15. We do not understand the Sperry retirees to dispute any of the findings of fact upon which the district court relied in concluding that the alleged policy of applying the reservation of rights clause only to active employees was not supported by the evidence or the court's conclusion that the retiree medical benefits were not vested. Rather, the retirees dispute the inferences from or the weight accorded these findings.

16. We reject the Sperry retirees' argument that the district court erred when it analyzed the extrinsic evidence because the court gave "too much weight to the subjective intentions of some company executives that were

III.

The Sperry retirees additionally contend that the district court erred in failing to sustain the separate contract claims of the "early retirees" or "VRIF" ("Voluntary Reduction in Force") retirees. The VRIFs asserted a claim separate from that of the regular retirees: that the company offered them certain benefits to induce them to retire which they accepted by retiring earlier than they would have. They contend that this offer and their acceptance formed a binding contract, independent of the contract rights asserted by the other retirees founded upon the basic plans. *See Sprague v. General Motors Corp.*, 768 F. Supp. 605 (E.D. Mich. 1991).[17]

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not disclosed to the employees, while ignoring the uncontradicted evidence of what the company said in explaining the plans to its employees, how the company applied the plans in practice and what the company knew its employees understood the plans to mean." (Appellants' brief at p. 37).

In *Taylor v. Continental Group*, 933 F.2d 1227, 1233 (3d Cir. 1991), we recognized that non-bargained ERISA plans (in that case, severance plans) raise special interpretational problems. To the extent that the retirees relied on extrinsic evidence of "what the company said in explaining the plans to its employees," and "how the plans were applied in practice," this evidence cannot be used to contradict the unambiguous written terms of an ERISA plan. Reliance on this evidence conflicts with Congress' intent that plan documents and SPDs exclusively govern an employer's obligations with respect to an ERISA plan. Thus, the district court did not err in its analysis of this extrinsic evidence here.

Further, while the informal statements made by the company that the benefits would continue for "life" do not alter the contractual analysis, as the district court found, "given the consistency and frequency that such communications were made, they would appear to support the retirees' other claims, such as their BOFD [Breach of Fiduciary Duty] claim." (A 2282). *See* appeal No. 94-1875.

17. The district court rejected this claim because the court found that the VRIF retirees were in no different position with respect to the contract claim than the other retirees:

> . . . [F]ollowing closing arguments, plaintiffs made a belated request in an attempt to distinguish a small group of class members from the class of Sperry regular retirees. These were individuals who retired under a voluntary reduction in force program ("VRIF"), not a VERIP. (*See* Supplemental Briefs, filed May 27, 1994.) The court allowed the parties to take some sample depositions and to brief the issue, in order to discover whether this small group did have any

Although it is true that the VRIFs retired early, foregoing future salary and pension accruals in order to secure the retiree medical benefits under their existing plans, the plans pursuant to which the VRIFs received retiree medical benefits contained clear and unequivocal reservation of rights clauses that permitted the company to end the plans at any time. *See, eg.*, the 1988 VRIF offering document advising the prospective participant of the entitlement to "coverage under the Post-Retirement Medical Plan in effect at the time your first [pension] check becomes payable." (A 4395). Medflex, the plan pursuant to which the VRIF retiree medical coverage was to be provided, contained an unambiguous reservation of rights clause.[18] (A 3011). While the VRIFs point out that the offering materials for their incentive plans promised the incentive benefits without any reference to a reserved right by the company to amend or terminate the plans, we find that this is not dispositive of their claim because the benefits which the VRIFs were to receive were described in summary plan descriptions containing unambiguous RORs. Consequently, the district court did not err in rejecting the VRIFs' separate bilateral contract claim.

IV.

We turn to the retirees' final argument that the district court erred in concluding that the estoppel claims of *all* of the regular retirees failed as a matter of law and erred in refusing to reconsider its grant of summary judgment on that claim. *In re Unisys*, 837 F. Supp. 670, 680-81 (E.D. Pa. 1993).

An ERISA beneficiary may recover benefits under an equitable estoppel theory upon establishing a material misrep-

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"special" claims. The court, however, finds that the VRIF individuals are in no different position than any of the other Sperry plaintiffs. Rather, any differences that do exist only go to bolster their [breach of fiduciary duty] claim.

(A 2264 n. 54).

18. Those employees who retired pursuant to a 1984 VRIF were likewise eligible to receive only those medical benefits under "the current health insurance plans" whose SPDs contained unambiguous RORs. (A 3029).

resentation, reasonable and detrimental reliance upon the representation, and extraordinary circumstances. *Curcio v. John Hancock Mutual Life Insurance Co., supra,* 33 F.3d at 235; *Smith v. Hartford Ins. Croup* [*sic*], 6 F.3d 131, 137 (3d Cir. 1993).[19] The retirees contend that they can establish these elements.[20]

While we acknowledge that many retirees may have relied to their detriment on their interpretation of the summary plan descriptions as promising vested or lifetime benefits, we nonetheless must reject their estoppel claim. Due to the unambiguous reservation of rights clauses in the summary plan descriptions by which Unisys could terminate its retiree medical benefit plans, the regular retirees cannot establish "reasonable" detrimental reliance based on an interpretation that the SPDs promised vested benefits. The retirees' interpretation of the plans as providing lifetime benefits is not reasonable as a matter of law because it cannot be reconciled with the unqualified reservation of rights clauses in the plans.

Our sister courts of appeals have also rejected estoppel claims because of the presence of unambiguous reservation of rights clauses on the basis that a participant's reliance on employer representations regarding benefits may never be "reasonable" where the participant is in possession of a written document notifying him of the conditional nature of such

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19. We reject Unisys' threshold argument that an estoppel claim is not cognizable under ERISA after the Supreme Court's decision in *Mertens v. Hewitt Assoc.*, ___ U.S. ___, 113 S. Ct. 2063 (1993). We have recently reaffirmed the viability of this claim by our decisions in *Curcio, supra,* and *Smith, supra.*

20. Regarding the requirement of a material misrepresentation, the district court found that the company had misinformed the retirees regarding the duration of their medical benefits coverage and that this misrepresentation was material. Indeed, the district court found that the company engaged in a "systematic campaign of confusion" which led employees to believe that their benefits were to continue for life. The retirees contend that the record clearly establishes that many of the retirees, including the early retirees or "VRIFs", relied to their detriment on the company's misrepresentations because many employees accelerated their retirement and gave up salary and pension accruals they would have gained if they had continued to work.

benefits. *See, e.g., Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir. 1993) ("[a]ll plan participants knew or should have known from the express terms of the Pullman plan that benefits could be altered at any time"). *Accord Alday v. Container Corp. of America*, 906 F.2d 666 (11th Cir. 1990) (promissory estoppel did not bar employer from modifying terms of retiree medical insurance plans despite participant's claim that employer induced him into believing that plan's terms would not change; plan unambiguously stated that the employer reserved the right to modify or terminate the plan), *cert. denied*, 498 U.S. 1026 (1991).

While our decisions have not required an express finding of plan ambiguity as an element for establishing an estoppel claim, we have required that reliance be reasonable. Because our decisions require that any detrimental reliance on plan language also be "reasonable," our finding that the RORs are unambiguous undercuts the reasonableness of any detrimental reliance by the retirees. Accordingly, we hold that the district court did not err in concluding, on summary judgment, that the retirees' estoppel claim failed as a matter of law.

V.

For the foregoing reasons, we will affirm the judgment of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX J

STATUTORY PROVISIONS

EMPLOYEE RETIREMENT INCOME SECURITY ACT (29 U.S.C.):

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

* * * *

(16)(A) The term "administrator" means —

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * * *

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

* * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * * *

§ 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan —

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in sections 1024(b)(3) and 1025(a) and (c) of this title.

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor

The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary —

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

(c) Terminal and supplementary reports

(1) Each administrator of an employee pension benefit plan which is winding up its affairs (without regard to the number of participants remaining in the plan) shall, in accordance with regulations prescribed by the Secretary, file such

terminal reports as the Secretary may consider necessary. A copy of such report shall also be filed with the Pension Benefit Guaranty Corporation.

(2) The Secretary may require terminal reports to be filed with regard to any employee welfare benefit plan which is winding up its affairs in accordance with regulations promulgated by the Secretary.

(3) The Secretary may require that a plan described in paragraph (1) or (2) file a supplementary or terminal report with the annual report in the year such plan is terminated and that a copy of such supplementary or terminal report in the case of a plan described in paragraph (1) be also filed with the Pension Benefit Guaranty Corporation.

(d) Notice of failure to meet minimum funding standards

(1) In general

If an employer maintaining a plan other than a multiemployer plan fails to make a required installment or other payment required to meet the minimum funding standard under section 1082 of this title to a plan before the 60th day following the due date for such installment or other payment, the employer shall notify each participant and beneficiary (including an alternate payee as defined in section 1056(d)(3)(K) of this title) of such plan of such failure. Such notice shall be made at such time and in such manner as the Secretary may prescribe.

(2) Subsection not to apply if waiver pending

This subsection shall not apply to any failure if the employer has filed a waiver request under section 1083 of this title with respect to the plan year to which the required installment relates, except that if the waiver request is denied, notice under paragraph (1) shall be provided within 60 days after the date of such denial.

(3) Definitions

For purposes of this subsection, the terms "required installment" and "due date" have the same meanings given such terms by section 1082(e) of this title.

(e) Notice of transfer of excess pension assets to health benefits accounts

(1) Notice to participants

Not later than 60 days before the date of a qualified transfer by an employee pension benefit plan of excess pension assets to a health benefits account, the administrator of the plan shall notify (in such manner as the Secretary may prescribe) each participant and beneficiary under the plan of such transfer. Such notice shall include information with respect to the amount of excess pension assets, the portion to be transferred, the amount of health benefits liabilities expected to be provided with the assets transferred, and the amount of pension benefits of the participant which will be nonforfeitable immediately after the transfer.

(2) Notice to secretaries, administrator, and employee organizations

(A) In general

Not later than 60 days before the date of any qualified transfer by an employee pension benefit plan of excess pension assets to a health benefits account, the employer maintaining the plan from which the transfer is made shall provide the Secretary, the Secretary of the Treasury, the administrator, and each employee organization representing participants in the plan a written notice of such transfer. A copy of any such notice shall be available for inspection in the principal office of the administrator.

(B) Information relating to transfer

Such notice shall identify the plan from which the transfer is made, the amount of the transfer, a detailed accounting of assets projected to be held by the plan immediately before and immediately after the transfer, and the current liabilities under the plan at the time of the transfer.

(C) Authority for additional reporting requirements

The Secretary may prescribe such additional reporting requirements as may be necessary to carry out the purposes of this section.

(3) Definitions

For purposes of paragraph (1), any term used in such paragraph which is also used in section 420 of Title 26 (as in effect on January 1, 1995) shall have the same meaning as when used in such section.

(f) Information necessary to comply with Medicare and Medicaid Coverage Data Bank requirements

(1) Provision of information by group health plan upon request of employer

(A) In general

An employer shall comply with the applicable requirements of section 1320b-14 of Title 42. Upon the request of an employer maintaining a group health plan, any plan sponsor, plan administrator, insurer, third-party administrator, or other person who maintains under the plan the information necessary to enable the employer to comply with the applicable requirements of section 1320b-14 of Title 42 shall, in such form and manner as may be prescribed in regulations of the Secretary (in consultation with the Secretary of Health and Human Services), provide such information (not inconsistent with paragraph (2)) —

(i) in the case of a request by an employer described in subparagraph (B) and a plan that is not a multiemployer plan or a component of an arrangement described in subparagraph (C), to the Medicare and Medicaid Coverage Data Bank;

(ii) in the case of a plan that is a multiemployer plan or is a component of an arrangement described in subparagraph (C), to the employer or to such Data Bank, at the option of the plan; and

(iii) in any other case, to the employer or to such Data Bank, at the option of the employer.

(B) Employer described

An employer is described in this subparagraph for any calendar year if such employer normally employed fewer than 50 employees on a typical business day during such calendar year.

(C) Arrangement described

An arrangement described in this subparagraph is any arrangement in which two or more employers contribute for the purpose of providing group health plan coverage for employees.

(2) Information not required to be provided

Any plan sponsor, plan administrator, insurer, third-party administrator, or other person described in paragraph (1)(A) (other than the employer) that maintains the information under the plan shall not provide to an employer in order to satisfy the requirements of section 1320b-14 of Title 42, and shall not provide to the Data Bank under such section, information that pertains in any way to —

(A) the health status of a participant, or of the participant's spouse, dependent child, or other beneficiary,

(B) the cost of coverage provided to any participant or beneficiary, or

(C) any limitations on such coverage specific to any participant or beneficiary.

(3) Regulations

The Secretary may, in consultation with the Secretary of Health and Human Services, prescribe such regulations as are necessary to carry out this subsection.

* * * *

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as

provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the rem-

edies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

* * * *

§ 1023. Annual reports

(a) Publication and filing

(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include —

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this subchapter is maintained by —

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 1002(16)(B) of this title,

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to

the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual reports by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 1024(b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 1024(a)(2) of this title a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) of this section prepared by a bank or similar institu-

tion or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) For purposes of this subchapter, the term "qualified public accountant" means —

(i) a person who is a certified public accountant, certified by a regulatory authority of a State;

(ii) a person who is a licensed public accountant licensed by a regulatory authority of a State; or

(iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by him for a person who practices in States where there is no certification or licensing procedure for accountants.

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section —

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this subchapter, the term "enrolled actuary" means an actuary enrolled under subtitle C of subchapter II of this chapter.

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) Financial statement

An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan; a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made

during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issue, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expense incurred in connection with the transaction; the

cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account main-

tained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is —

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction

with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) Information to be furnished by administrator

The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

(d) Actuarial statement

With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) Information required in regulations of the Pension Benefit Guaranty Corporation with respect to:

(A) the current value of the assets of the plan,

(B) the present value of all nonforfeitable benefits for participants and beneficiaries receiving payments under the plan,

(C) the present value of all nonforfeitable benefits for all other participants and beneficiaries,

(D) the present value of all accrued benefits which are not nonforfeitable (including a separate accounting of such benefits which are benefit commitments, as defined in section 1301(a)(16) of this title), and

(E) the actuarial assumptions and techniques used in determining the values described in subparagraphs (A) through (D).

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary —

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) A statement by the actuary which discloses —

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

(11) If the current value of the assets of the plan is less than 70 percent of the current liability under the plan (within

the meaning of section 1082(d)(7) of this title), the percentage which such value is of such liability.

(12) Such other information regarding the plan as the Secretary may by regulation require.

(13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

(e) Statement from insurance company, insurance service, or other similar organizations which sell or guarantee plan benefits

If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating—

(1) the premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization and the approximate number of persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records

covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organization and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

* * * *

§ 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary,

upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

(2)(A) With respect to annual reports required to be filed with the Secretary under this part, he may by regulation prescribe simplified annual reports for any pension plan which covers less than 100 participants.

(B) Nothing contained in this paragraph shall preclude the Secretary from requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this subchapter nor shall the Secretary be precluded from revoking provisions for simplified reports for any such plan if he finds it necessary to do so in order to carry out the objectives of this subchapter.

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this subchapter, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans.

(4) The Secretary may reject any filing under this section—

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 1023(a)(3)(A) or section 1023(a)(4)(B) of this title.

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions —

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title —

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title

which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material (including the percentage determined under section 1023(d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe

the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) Statement of rights

The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this subchapter.

* * * *

§ 1025. Reporting of participant's benefit rights

(a) Statement furnished by administrator to participants and beneficiaries

Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) One-per-year limit on reports

In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) of this section during any one 12-month period.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement

Each administrator required to register under section 6057 of Title 26 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration state-

ment required by section 6057(a)(2) of Title 26. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

(d) Plans to which more than one unaffiliated employer is required to contribute; regulations

Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.

* * * *

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedures described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

* * * *

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent

man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * * *

§ 1108. Exemptions from prohibited transactions

* * * *

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employ-

ers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

* * * *

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * * *

§ 1113. Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

* * * *

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any

act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

* * * *

(c) Refusal to supply requested information; failure to comply with notice requirements; penalties

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an

annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation. The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

* * * *

Supreme Court, U.S.
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No. 95-376

In The

Supreme Court of the United States

October Term, 1995

UNISYS CORPORATION,

Petitioner,

v.

GERALD E. PICKERING, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents would restate the questions presented by the Petition as follows:

1. May a breach of fiduciary duty claim be maintained under ERISA where:

(a) the applicable summary plan descriptions ("SPDs") stated expressly, and without qualification, that the duration of retiree medical benefits was for life, but reservation clauses elsewhere in the SPDs stated that the company reserved the right to terminate the plans;

(b) company representatives affirmatively, repeatedly and systematically misinformed employees that once they retired, their medical benefits would continue for life; and

(c) the company knew that employees therefore believed that their benefits could not change after they retired and were making important retirement decisions based upon this belief?

2. Does ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorize ERISA plan participants to obtain equitable relief to remedy the harm they suffer from an employer's breach of the fiduciary duty not to misinform them about terms of the plan?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Gerald E. Pickering, et al., respectfully request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

On November 3, 1992, Petitioner Unisys Corporation ("Unisys") announced that it was terminating, effective January 1, 1993, the health benefit plans under which it and its predecessors (the Sperry and Burroughs Corporations) had provided medical coverage to retired employees and their eligible dependents. Respondents are retirees of Sperry and Unisys who retired between 1969 and April 1, 1989 under 75 different benefit plans established and maintained by Sperry Corporation (and then Unisys) through 1992 ("Retirees"). They have challenged Unisys' termination of their benefits under ERISA on the ground that Sperry and then Unisys promised them that their benefits would continue for life without change. They assert causes of action based on breach of plan terms/contract, breach of fiduciary duty, and equitable estoppel. The district court dismissed the contract and estoppel claims on the ground that Unisys had effectively reserved the right to change or end the plans at any time. It sustained the claim of fiduciary breach. The court of appeals affirmed these rulings in all respects.

Unisys petitions for a writ of certiorari from the court of appeals' interlocutory decision, on certification under 28 U.S.C. § 1292(b), upholding the claim of fiduciary breach. This brief opposes Unisys' petition. Together with this opposition brief, the Retirees are filing a conditional cross-petition for a writ of certiorari to obtain review of the court of

appeals' decision on the Retirees' consolidated appeal relating to the contract and estoppel claims.

Factual Background

Unisys systematically misinformed the Retirees in this case that their medical benefits would last "for life" when they retired, even though, according to rulings of the courts below, the company had reserved the right to end these benefits at any time. Unisys conveyed this misinformation in a pattern of unqualified written and oral assurances that the district court found so regular and pervasive as to constitute a "systematic campaign of confusion" (App. 96a). Unisys does not dispute that it gave these assurances, and continued to give them, despite its knowledge that: (a) the misrepresentations were leading employees to believe that the health benefits in effect when they retired would continue for life without change; and (b) employees were making retirement decisions based on this belief. (App. 9a & n. 6, 19a & n. 15, 20a & n. 16, 21a, 83-84a).

Each of the Sperry plans stated without qualification that, upon an employee's retirement, his medical benefits would continue for life. The earliest of the "lifetime" plans, issued in 1969, stated:

> When you retire . . . the . . . coverage then in force for you and your eligible dependents will be continued at no cost to you for the rest of your life.

(A3120 [record below], 1969 Sperry Division summary plan description). By 1980, similar plans and plan language were adopted throughout the company:

> Coverage At Retirement
>
> . . . Coverage will continue for you and your Eligible Dependents throughout your lifetime and for the lifetime (or until remarriage) of your spouse.

(A2780-81, 1982 Univac summary plan description).

Provisions reserving the right to change or end the plans appeared elsewhere in the plans. Beginning in 1982, these provisions were separated from the lifetime language by more than 80 pages without any cross-reference or other warning. See, e.g., App. 37a, 47a. The standard reservation of rights provision ("ROR") stated: "The Company expects to continue the Plans, but reserves the right to change or end them at any time." (App. 37a). The reservation provisions did not state that the reservation applied after retirement or that it overrode the unqualified promises of lifetime benefits which were stated elsewhere in the SPDs.

The district court found that officials at all levels of the company repeatedly and systematically assured employees that, despite the RORs, the benefits in effect when they retired would continue for the rest of their lives. (App. 79-80a). At the trial, the Retirees presented evidence to this effect from more than 50 witnesses. The district court found:

> This is not a case where one or two low-level benefits counselors told a few retirees that their benefits would continue for life. The message that medical benefits would last for life was confirmed repeatedly and systematically throughout the Sperry

> organization, by all levels of management, in writing and verbally.

(App. 80-81a; see also App. 83a) The court's "sampling" of the evidence presented at trial (App. 84a nn. 68-69) included the following examples of written and oral assurances:

> You remain eligible for the [post-retirement medical] plan throughout your lifetime . . . Sperry will pay the full cost of your coverage under the Plan.

(A2762, Medflex post-retirement medical brochure, cited at App. 84a n. 68);

> [W]hichever [plan, Medflex or pre-Medflex] you take, you have to remember it's going to be for a lifetime.

and

> [You and your wife will] be guaranteed medical insurance as long as [you] live.

(A8235, A8271, assurances from benefits counselors, cited at App. 84a n. 68);

> Now, the basic hospital-surgical-medical *and* major medical coverages will continue for your life and the life of your spouse, providing you terminate on or after June 19, 1979 . . . This coverage is provided at no cost to you.

(A3615, 1979 letter to employees from Sperry Division President, cited at App. 84a n. 68);

> Don't worry, they would not have offered the program, okay in this manner, shape or form, leaving the medical intact, if their intention was to take it away from retirees. They would just not. They'd tell you that you weren't going to be able to go with it. So I wouldn't even think twice about it. And I mean

> that sincerely . . . [y]ou go with the medical and you have that, as far as I'm concerned, for life, okay . . . Same as you have now.

(A4673, Transcript from audiotaped Pre-retirement Seminar 1986, cited and quoted in part at App. 97a n. 76).

The district court also cited testimony from company executives, including: (1) one Human Resources Vice President who instructed his staff to tell employees that once they retired "[the Company's medical benefits promise] was a lifetime financial security that they could depend on" (App. 56a); (2) another who testified to

> discussions [with employees] . . . how does that impact us with respect to our plans following retirement. Will that be changed? Will you modify those? And, no whatever. Whatever. Whatever was in effect remains in effect . . . .

(App. 84a n. 69; see also App. 59a); and (3) benefits counselors who told inquiring Retirees that:

> [the ROR] pertained to active employees and not to the retirees. That . . . once they received their medical benefit, they would be continued for their lifetime and their spouse's lifetime.

(App. 84a n. 69) and that their post-retirement medical benefits were "guaranteed to them for life." (*Id.*)[1]

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[1] The same message, moreover, was confirmed for employees by the company's practice. The company never reduced the medical benefits of employees who had already retired, even when it implemented reductions in retiree benefits for active employees who would retire in the future. (App. 79a). Employees who had already retired were not affected by these reductions, and continued, through 1992, to be covered by the various plans under which they retired. (*Id.* and App. 33a).

Finally, the district court found that the company *knew* the effects of its misstatements. It knew that its employees believed that once they retired their benefits would continue for life without change.

> It is clear that the highest levels of corporate management at Sperry, and later Unisys, recognized that employees might be under the . . . belief that "lifetime" meant forever.

(App. 83a). The company also knew that employees were making retirement decisions based on this belief. One top-level manager acknowledged, for example, that a "change to Post-Retirement Medical coverage can be a powerful motivation to certain employees who have considered retirement . . . but have not yet reached their final decisions" (A4088); and that a desire to avoid the benefit changes of a new plan "can tip the scale for those who were considering retiring and may accelerate their decision to do so. . . . " (A4085). According to Sperry's Senior Vice President for Personnel:

> We said this is yours for life. You have got it for life. And people made decisions on that. They decide whether to go [*i.e.*, retire] or not go on the basis that they were told this is life.

(App. 39a n. 19).

Employees accelerated their retirements based on the company's assurances (as the company knew they would) and thereby gave up salary and pension accruals that they would have earned if they had continued to work. (App. 154a n. 20). For example, George Rieger, who retired in 1984 in response to a voluntary layoff solicitation shortly before Unisys replaced his medical plan with a new, less generous plan, was

first assured by a benefits counselor, and in writing by the Human Resources Vice President, that if he volunteered for retirement his medical benefits would be provided for life under the plan in effect on the date he retired, and not the new plan. (Tr. A2532 [133], A3810). When Rieger asked whether there was any risk that his medical benefits could be changed after retirement, the Human Resources Vice President told him, "Once you retire and take your first pension check from the company . . . that's it," (Tr. A2534-35), and that by volunteering to retire he would protect himself "from any kind of a potential change that could result in a lesser medical coverage benefit than I now have." (Tr. A2532 [135]) This assurance was "vital" to Rieger's decision to volunteer to retire. (Tr. A2536 [148]; see also Tr. A2533-36 [137, 141-42, 145-48])

The Proceedings And Decisions In The District Court

Early in the case, Unisys filed a motion seeking entry of summary judgment based on the RORs. The district court granted the motion on the Retirees' breach of fiduciary duty and estoppel claims, but denied summary judgment on the contract claim. In explaining its ruling on the contract claim, the district court observed that: "the written promise of 'lifetime benefits' has powerful meaning to retiring employees" (App. 113a n. 13); the internal inconsistency between the unqualified, specific lifetime promises and generic RORs made the plans facially ambiguous (App. 111a, 115a); and a trial on the extrinsic evidence was required to resolve the ambiguity (App. 115a).

The case was then tried to the court. After trial, the district court reversed its position on both the contract and

breach of fiduciary duty claims, entering judgment against the Retirees on the contract claim and reversing its earlier dismissal of the breach of fiduciary duty claim. The district court reversed its position on the contract claim because it understood the court of appeals' decision in *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), later *rev'd on other grounds*, 115 S.Ct. 1223 (1995), which was handed down during the trial, to require it to do so. "The *Curtiss-Wright* decision," the district court wrote, "suggests that there is nothing inconsistent about having lifetime language and a ROR in the same document. . . . I now conclude that my original analysis on this point was incorrect." (App. 71a, citation omitted). The district court read *Curtiss-Wright* to establish a *per se* rule that an ROR always "trumps" a promise of lifetime benefits, thus rendering the Sperry plans unambiguous as a matter of law.[2]

On the breach of fiduciary duty claim, the court granted reconsideration of its original grant of summary judgment based on the court of appeals' intervening decision in *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), which also was decided during the trial. Based on *Bixler*, the district court concluded that the Retirees' proof of a "systematic campaign of confusion" by the company about the duration of retirement benefits (App. 96a) supported the Retirees' claim of fiduciary breach. (App. 83a).

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[2] The court reached this conclusion despite its findings that what the company did communicate systematically led employees to believe that benefits were guaranteed when they retired. At the same time, the district court declined to reconsider its dismissal of the Retirees' estoppel claim, even though that claim was based on the same pattern of misrepresentations that supported the breach of fiduciary duty claims. (App. 86a).

The Court Of Appeals' Decision

The court of appeals affirmed the district court in all respects. In upholding reinstatement of the Retirees' breach of fiduciary duty claim, the court affirmed the district court's "detailed and well supported findings" (App. 20a) that: (1) Unisys knew that its employees believed the assurances of lifetime benefits they had been given; (2) employees were making retirement decisions based on their understanding that the benefits in effect when they retired would continue for life; (3) Unisys executives were aware that the lifetime medical benefit was an important consideration for employees who were considering when to retire; (4) Unisys knew that employees accelerated their retirement plans because of the belief that by retiring at a certain point in time they would "lock in" the lifetime coverage that they had under the current plan; and (5) despite its knowledge that retirees were electing to retire based on this understanding, Unisys failed to correct the misinformation, and instead reinforced the misinformation by continuing to repeat the assurances that benefits in place upon retirement would continue for life. (App. 20a). Summarizing the district court's findings as follows:

> . . . . The district court found that the company, both actively and affirmatively, systematically misinformed its employees about the duration of their benefits by stating over and over again, without qualification, that their benefits would continue for life . . . [and] consistently responded to specific inquiries about whether a retiree's benefits could change by telling employees that they could not.

(App. 21a), the court concluded that the record clearly supported the Retirees' claim for breach of fiduciary duty.

On the contract claim, the court adopted the company's interpretation of the plans as one compelled by law, holding that the specific, lifetime language was necessarily limited by the RORs. The court of appeals did not actually conclude that the Retirees' interpretation – that the lifetime language limited the RORs – was not reasonable. The court held instead that "[t]he presence of lifetime language and the reservation of rights clauses here did not *necessarily* render the . . . plans ambiguous" (App. 147a n. 11, emphasis added), and concluded that "[w]here . . . the reservation of rights is broad and unequivocal, it will prevail over a promise of lifetime benefits" as a matter of law. (*Id.*).

The court of appeals also affirmed the district court's analysis of the extrinsic evidence. In affirming the district court's conclusion that the "lifetime promises" in the plans did not manifest an intent on the part of the company to vest benefits, the court relied primarily on the company's use of the word "vested" in its medical plan for its top level executives, but not in the rank and file plans. (App. 151a).[3]

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[3] The court explained its refusal to consider the evidence of what the company actually communicated on the ground that such evidence "cannot be used to contradict the unambiguous written terms of an ERISA plan." (App. 152a n. 16). It did not explain why, however, it was proper to consider Unisys' proffered extrinsic evidence of what the company intended but did *not* disclose to employees.

The court of appeals also affirmed the district court's rejection of the Retirees' estoppel claims. The court found that Unisys had materially misrepresented the plan (App. 154a n. 20), knowing that employees were misled into believing that their benefits were not subject to change after they retired and were retiring based on this belief (App. 154a), but rejected

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW APPLIES SETTLED LAW THAT ERISA PLAN FIDUCIARIES MAY NOT MISLEAD OR MISINFORM EMPLOYEES ABOUT PLAN BENEFITS.

The facts of this case are extraordinary. However, the governing legal principles are well established. There is no controversy among the courts of appeals about the appropriate ERISA fiduciary standards to apply, nor about their application to the unusual facts of this case. The decision of the court of appeals does not warrant review by the Court.

The facts, which Unisys studiously avoids, establish that Unisys actively misinformed its employees that their medical benefits were guaranteed for life once they retired. In fact, the lower courts have concluded, the benefits were subject to change at any time and the company knew that employees were making important retirement decisions based on the misinformation.

The applicable law is uncontroversial. This Court has clearly held that the strict trust law fiduciary standards of loyalty and care apply to ERISA fiduciaries in their dealings with plan participants. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-72 & n. 10 (1985) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts . . . ."; ERISA imposes "strict standards" on fiduciaries); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101,

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the Retirees' estoppel claim because of its conclusion that the plans reserved the right to terminate the benefits. (App. 155a).

109-10 (1989); 29 U.S.C. § 1104(a); G. Bogert, *Trusts*, § 96 at 348, 350 (6th ed. 1987). These standards were imposed "[t]o help fulfill ERISA's broadly protective purposes," which include safeguarding "the continuing well-being and security of millions of employees and their dependents." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S.Ct. 517, 524 & n. 5 (1993), quoting 29 U.S.C. § 1001(a). The duties owed by ERISA fiduciaries are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.) (Friendly, J.), *cert. denied*, 459 U.S. 1069 (1982).

Every court of appeals that has addressed the question has agreed that ERISA fiduciaries may not mislead those to whom they owe the duties of loyalty and care.[4] The decision

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[4] *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, 57 F.3d 1255, 1261-62 (3d Cir. 1995); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 986 (3d Cir. 1995); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2416 (1993); *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Howe v. Varity Corp.*, 36 F.3d 746, 753-54 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 1792 (1995); *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984); *Barker v. American Mobil Power Corp.*, 1995 U.S. App. LEXIS 25259 at *16-17 (9th Cir. Sept. 8, 1995); *Maez v. Mountain States Tel.*, 54 F.3d 1488, 1500-01 (10th Cir. 1995); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991); *Local Union 2134 v. Powhatan Fuel, Inc.*, 828 F. 2d 710, 713-14 (11th Cir. 1987); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990).

below correctly applies this well-settled law and there is no uncertainty or conflict among the circuits which requires review by the Court.

H. THE UNIQUE AND UNDISPUTED FACTUAL RECORD OF THIS CASE SHOWS THAT THE COMPANY ENGAGED IN A CONTINUING, SYSTEMATIC PRACTICE OF MISREPRESENTING BENEFITS TERMS TO EMPLOYEES. THE DECISION DOES NOT IMPOSE ANY NEW REQUIREMENTS ON EMPLOYERS.

Contrary to Petitioner's claim, this is not a case about an employer's passive or unwitting breach of a "duty to remind" employees about information that has been clearly and adequately disclosed in an SPD. (Pet. 12). This case instead concerns a fiduciary's duty not to actively misinform employees through material misrepresentations and incomplete, inconsistent, and contradictory disclosures. (App. 16a). Based upon the striking but undisputed facts of this case, the court of appeals correctly ruled that Unisys' knowing conduct constituted "a breach of that duty in its most basic form." (App. 17a).

Unisys finds no support for its conduct in this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995),[5] or in any of the court of appeals decisions cited

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[5] *Curtiss-Wright* concerned disclosure duties under ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), and did not address the general fiduciary duties under § 404(a), 29 U.S.C. § 1104. The court of appeals correctly held that satisfaction by a plan administrator of its minimum statutory disclosure obligations does not foreclose liability when the administrator breaches its fiduciary duty to communicate truthfully to plan

in its petition (Pet. 15 n. 14). The ruling below is not in conflict with these decisions. First, these decisions do not begin to suggest that Unisys is insulated from liability for knowing misrepresentations because it also included reservation provisions in the statutorily required SPDs. Unlike the "duty to remind" case hypothesized by Petitioner, the record here shows a "systematic campaign of confusion" about the meaning of the SPDs (App. 96a, 154a n.20). Although there were RORs in the SPDs, the SPDs also described the benefits as lasting "for life". Petitioner went further and voluntarily undertook to reinforce the unqualified promises of lifetime benefits found in the SPDs through its repeated and systematic misrepresentations. The company knew that the misrepresentations were misleading employees into believing that their benefits could not be changed once they retired. ERISA does not provide, and this Court did not hold in *Curtiss-Wright*, that a fiduciary is free to actively misrepresent benefits. Indeed, no court has ever held that if a fiduciary makes minimum statutory disclosures through distribution of an SPD containing an ROR, it can then proceed to misrepresent plan terms systematically and knowingly to participants.

Second, voluntary and active misconduct is the basis for Unisys' liability, not an innocent failure to remind employees about a clear provision in an SPD. The court of appeals did not impose a new disclosure obligation on employers. It simply applied well-established law that Unisys' knowing and pervasive misrepresentations violated ERISA's strict fiduciary standards.

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participants by making simultaneous or subsequent material misrepresentations, as Unisys did in the present case. (App. 16a).

Third, Unisys' plea that it merely failed to remind employees about what was in the SPDs is particularly untenable given the record of this case. The SPDs themselves did not make a clear disclosure that the company's supposed right to amend or terminate benefits applied after the employee had retired, especially given the company's pervasive misrepresentations to the contrary. The record showed that:

(1) the relationship between the plans' express, unqualified lifetime language and the RORs was not clear to the average Sperry employee,[6] or to benefits counselors whose job it was to explain the plan, company Human Resources Vice Presidents to whom those counselors reported, or executives at the highest levels of the company, *and Unisys knew this*;

(2) the district court recognized when it first construed the plans that the Retirees' interpretation was plausible and that the unqualified lifetime statements made the SPDs ambiguous;

(3) Unisys' key witness admitted at trial that the SPDs were unclear and potentially misleading to employees (Tr. A2667-69); and

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[6] The lifetime language in the plans was free-standing and unqualified. The RORs appeared only in the back of the booklets, as much as 80 or more pages from the lifetime promises, and without any cross-reference or direction to employees that they governed the lifetime benefits of existing retirees. Under ERISA's disclosure rules, SPDs must be "written in a manner calculated to be understood by the average plan participant", 29 U.S.C. § 1022(a)(1). But the SPDs here were not. They instead had "the effect [of] misleading, misinforming or failing to inform" employees and did not include the required "clear cross references" to limitations on benefits described "in a manner not less prominent than" the promise of lifetime benefits, 29 C.F.R. § 2520.102-2(b).

(4) the district court, in concluding that the company did intend the ROR to apply to existing retirees, relied almost exclusively upon the subjective beliefs of a few company executives that were never disclosed to employees.

Finally, the court of appeals' decision does not conflict with the principle that a written ERISA plan may not be modified by oral statements or informal amendment. The cases cited by Unisys in support of this argument (Pet. 16-17) are inapposite. In each case, the plaintiff asserted a contractual right to benefits based on alleged oral modifications of a written agreement. In none of those cases did the plaintiffs prove systematic misrepresentations that the employer knew were causing employees to misunderstand the terms of the plan.

III. THERE IS NO REASON TO HOLD THE PETITION PENDING THE COURT'S DECISION IN *VARITY CORP. v. HOWE*. THE CASES ARE FACTUALLY DISSIMILAR AND RAISE UNRELATED QUESTIONS.

There is no reason to hold the petition in suspense pending the decision in *Varity Corp. v. Howe*, No. 94-1471, much less hear this case "in tandem" (Pet. 11) with it. Resolution of the questions on which certiorari was granted in *Howe* will not likely have any effect on the outcome of this case.

The threshold question in *Howe* is whether the employer's actions in inducing employees to accept transfer to a new, insolvent affiliate is governed by ERISA's rules of fiduciary conduct for plan administrators, or instead by state law. (See Br. of Petitioner Varity Corp. 29-41; Reply Br. of Varity Corp. 10-14; Reply Pet. for Cert. of Varity Corp. 3-4).

The Court's decision on this question in *Howe* will have no bearing on this case, because Unisys has never disputed or sought review of the conclusions of the courts below that its conduct explaining the nature and duration of the retiree medical benefits was fiduciary conduct governed by ERISA. See App. 11a n. 9. Although Unisys is suggesting for the first time in its petition that its conduct explaining benefits was not governed by ERISA (Pet. 12 n. 11), this argument was not raised in either court below. Indeed, Petitioner uniformly asserted in its Answers that ERISA preempted all state law claims, and the district court so ruled without protest by Petitioner. (App. 117a). Petitioner cannot argue now that its conduct was not governed by ERISA. See *U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n. 5 (1994); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981). Thus, the ruling on the fiduciary status of Varity Corporation in misrepresenting the business prospects of the new affiliate will not apply to this case.

In addition, the employer conduct at issue in *Howe* is quite different from the employer conduct at issue in this case. Petitioner itself concedes that *Howe* "arises from a distinctly different set of facts." (Pet. 11). Similarly, Varity Corporation distances itself from this case by emphasizing that it engaged in no misstatements about the nature of the benefits themselves, there is no finding of any company representation that benefits would continue for life or for any particular length of time, and there is no dispute that a reservation of rights was adequately disclosed. (Br. for Petitioner Varity Corp. 8; Reply Br. 13 & n. 16). Thus, even if the Court concludes that Varity's conduct was governed by ERISA fiduciary standards, the ruling on the legality of that

conduct will not apply to petitioner's distinctly different conduct in systematically misleading employees with affirmative, unqualified promises of lifetime benefits which it knew to be untrue.

The second question on which review has been granted in *Howe* is whether individual plan participants and beneficiaries may obtain relief for an ERISA plan administrator's breach of fiduciary duty which harms them but not necessarily the plan as a whole. With one exception, all of the courts of appeal which have ruled on this point have agreed that the broad, unqualified language of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes such relief.[7]

The only circuit in which this rule is not entirely settled is the Ninth Circuit, which adopted a rule that relief for fiduciary breaches may run only to the plan or to all participants. See *McLeod v. Oregon Lithoprint Inc.*, 46 F.3d 956,

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[7] *See In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, *supra*, 57 F. 3d at 1267-68; *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, *supra*, 12 F.3d at 1298-1300 (equitable relief is available to individual under § 502(a)(3) for misleading information); *Anweiler v. American Elec. Power Service Corp.*, *supra*, 3 F.3d at 993 (equitable relief may be granted to individual participant under § 502(a)(3) for breach of fiduciary duty in failing to disclose that reimbursement agreement was voluntary); *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 230 (7th Cir. 1990) (ERISA § 502(a)(3) may impose liability on a fiduciary that runs directly to the beneficiary); *Howe v. Varity Corp.*, *supra*, 36 F.3d at 754-55 (rejecting employer's argument that § 502(a)(3) claims can only be brought on behalf of a plan and cannot inure to the participants' benefit; participants cannot collect monetary damages as such, but they may obtain full range of individual equitable relief, including restitution); *Eddy v. Colonial Life*, *supra*, 919 F.2d at 750. *See also Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1336 (5th Cir.), *cert. denied*, 113 S.Ct. 812 (1992) (acknowledging that § 502(a)(3) affords equitable relief to participants for fiduciary breaches).

959 (9th Cir. 1995); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417-18 (9th Cir. 1991). However, in neither case did the participants seek equitable relief for misrepresentations; instead, they sought compensatory damages (*McLeod*) or benefits due if discretionary authority were exercised in their favor (*Horan*). In other cases where the relief sought was equitable, the Ninth Circuit allowed participant-related relief for a breach of fiduciary responsibilities under ERISA §§ 502(a)(3) and 409. It required that a company make restitution to the plan for the breach of fiduciary duty and ordered that participants be paid under a constructive trust. See *ACTWU v. Murdock*, 861 F.2d 1406, 1416-17 (9th Cir. 1988); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337 (9th Cir. 1994). In its most recent decision, the Ninth Circuit has taken another step to limit the rule barring relief for harm to individual participants. In *Barker v. American Mobil Power Corp.*, *supra*, the court ruled that relief may be available for a breach of fiduciary duty which affected only two remaining plan participants. 1995 U.S. App. LEXIS at *4 & n.1, 22-24. Thus, the vitality of any supposed bar to individual relief in the Ninth Circuit is open to doubt.

The conclusion that ERISA affords individual plan participants recourse for fiduciary breaches that harm them follows from the plain words of § 502(a)(3), the structure of the entire statute and the very purposes of ERISA. In further support of the court of appeals' decision on this point, Respondents respectfully adopt and incorporate the arguments set forth in the briefs filed in *Howe* by respondents and *amici* the United States, the National Employment Lawyers Association, and the American Association of Retired Persons.

Assuming that this Court rules in *Howe* that the employer's conduct was governed by ERISA, then the Court may address the availability of individual relief for fiduciary violations under § 502(a)(3). However, the court of appeals' decision in this case could be affected only if the Court in *Howe* were to endorse the extreme minority view among the circuits and hold that ERISA plan participants have no individualized remedies for violations of fiduciary duties which harm them. In this event, which Respondents respectfully view as unlikely, the courts below on remand from this interlocutory appeal can readily implement any ruling on the scope of § 502(a)(3). Indeed, they would be bound to do so without specific direction from this Court. To hold the petition in suspense pending the decision in *Howe* would not be useful.

CONCLUSION

The decision of the court of appeals is based on a unique factual record and correctly applies well-settled principles of the law governing ERISA fiduciaries. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNISYS CORPORATION,
Petitioner,
v.
GERALD E. PICKERING, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. Respondents argue that there is no reason to hold Unisys' petition pending the Court's decision in *Varity Corp. v. Howe,* 115 S. Ct. 1792 (1995) (No. 94-1471; argued November 1, 1995), because the cases "raise unrelated questions." Opp. 16. A review of the questions presented and the brief of the petitioner in *Varity,* however, shows that Respondents are wrong.

The first question presented in *Varity* (which Respondents have characterized as the "second question" in an apparent attempt to downplay its importance) is *identical* to the first question presented in Unisys' petition — does section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), permit individual plan participants and beneficiaries to sue on their own behalf, and

not on behalf of an ERISA plan, for alleged breaches of fiduciary duty under ERISA? *See* Brief of Petitioner Varity Corporation i. Should the Court resolve this question in favor of the employer in *Varity,* Respondents' breach of fiduciary duty claims in this case will necessarily fail, and this protracted litigation will come to a close. Respondents glibly dismiss this possibility, arguing that it is unlikely that the Court will endorse what Respondents characterize as the "extreme minority view among the circuits." Opp. 20. This Court, however, has chosen to review and decide the issue after full briefing and argument, and it is the Court's decision on the merits that should govern the disposition of the issue in this case as well. Respondents' self-serving prediction of how the Court will decide is no substitute for this Court's actual decision, and it provides no basis for rejecting the present petition while *Varity* is pending.

The second question presented in *Varity,* although not identical to the second question presented by Unisys' petition, does raise issues under ERISA that are directly relevant to Respondents' breach of fiduciary duty claims in this case. First, both cases present what Respondents have described as the "threshold question" (Opp. 16) of whether the employer's conduct was governed by ERISA's fiduciary standards. Although Respondents argue that Unisys has waived its right to raise this issue (Opp. 17), they are wrong. In briefs filed in both courts below, Unisys expressly argued that the conduct on which Respondents based their breach of fiduciary duty claims was not fiduciary in nature. *See* Reply Memorandum of Law in Support of Motion of Defendant Unisys Corporation for Partial Summary Judgment and in Opposition to Plaintiffs' Conditional Motion Pursuant to Fed. R. Civ. P. 56(f) 42-44; Brief of Appellant Unisys Corporation 40-42. Indeed, the district court originally granted Unisys' motion for partial summary judgment, partly on this basis. App. 115a-117a. Similarly, the court of appeals addressed this issue in its decision, making the incredibly broad statement that "[w]hen a corporate plan administrator speaks about benefits to its employees, the administrator acts in a fiduciary capacity even if he speaks about a non-fiduciary decision such as the business decision to

terminate a welfare benefit plan."[1] App. 11a n.10. There can be no question, therefore, that this issue was raised by Unisys below and has not been waived.

Second, both this case and *Varity* involve the issue of the role that a summary plan description plays in satisfying an employer's fiduciary duty of disclosure. In *Varity*, the precise issue is whether the employer's disclosure in a summary plan description of its right to amend or terminate a benefit plan is sufficient to overcome allegedly fraudulent misrepresentations regarding subjects not covered in the summary plan description — the future viability of a new corporate entity into which plan participants were induced to transfer, the new entity's business outlook, and the employer's expectation as to whether its benefit programs would remain unchanged in the future. *See* Brief of Petitioner Varity Corporation 35-42. In the instant case, the issue is whether, despite the summary plan description's disclosure of Unisys' right to amend or terminate its benefit plans, Unisys had a fiduciary duty to advise plan participants of that very right in the context of various informal oral and written communications referring to the "lifetime" duration of retiree medical benefits. *See* Pet. 12-13.

Thus, although the facts in this case and *Varity* are different, the legal issues to be addressed by the Court in *Varity* are closely related to the issues presented by Unisys' petition, and the resolution of those legal issues will dictate whether Respondents can continue to pursue their breach of fiduciary duty claims against Unisys. Given these circumstances, if the Court decides not to hear this case in tandem with *Varity*, the Court should hold Unisys' petition pending its decision in *Varity*.

2. In its petition, Unisys argued that the individual fiduciary duty of disclosure that the courts below imposed on Unisys was inconsistent with the uniform disclosure scheme envisioned by Congress when it enacted ERISA, and was at odds with this Court's decision in *Curtiss-Wright Corp. v. Schoone-*

1. Notably, Respondents did not argue in the court of appeals that Unisys had waived its right to raise this issue.

jongen, 115 S. Ct. 1223 (1995), and similar decisions of several courts of appeals. *See* Pet. 14-17. Respondents argue in response that Unisys "finds no support for its conduct" in these decisions because they did not involve the kind of conduct at issue in this case. Opp. 13-14. Respondents insist that Unisys' conduct should be characterized as "knowing misrepresentations" and that therefore that conduct forms a more acceptable basis for potential liability than would "an employer's passive or unwitting breach of a 'duty to remind' employees about information that has been clearly and adequately disclosed in an SPD." Opp. 13-16.

Labels aside, however, it was Unisys' failure to couple its informal communications to plan participants about "lifetime" benefits with a statement that the plans could be amended or terminated that the courts below held could give rise to a breach of fiduciary duty. Indeed, the district court was specific in its description of what Unisys could have done to satisfy its fiduciary duty of disclosure:

> Defendant could have easily (1) put an explicit ROR [reservation of rights clause] in each informal communication given to employees rather than only use the lifetime language; and (2) when employees made specific inquiries to benefit counselors during exit interviews and at group retirement sessions, the Company could have instructed the counselors to tell prospective retirees that although the word "lifetime" is used, the Company always reserves its right to terminate the plans.

App. 84a.

No matter what label is used to describe Unisys' conduct, therefore, the issue remains the same — did the courts below err in requiring Unisys to reiterate its right to amend or terminate its medical benefit plans in each and every informal communication, exit interview, and group retirement session when that right had concededly been disclosed to employees in an unambiguous summary plan description? In concluding that Unisys may have had such a duty, the courts below imposed a disclosure obligation on employers such as Unisys

that has no basis in the statute or the applicable regulations. Contrary to Respondents' assertions, it is precisely this type of expansive view of an employer's disclosure obligations that this Court rejected in *Curtiss-Wright* and that the courts of appeals refused to embrace in the cases cited in Unisys' petition.

3. In an apparent attempt to downplay the importance of the court of appeals' decision, Respondents have characterized the facts in this case as "unique" and "striking." Opp. 13. A review of the case law, however, reveals that plan participants have repeatedly relied upon informal "misrepresentations" as a vehicle for attempting to obtain benefits to which they were not entitled under the written terms of a plan. These claims often were asserted originally under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), and were uniformly rejected by the courts of appeals as an attempt to informally amend written benefit plans. *See, e.g., Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (rejecting claim for benefits based on oral misrepresentation because courts are "bound by ERISA's emphatic preference for written agreements"); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1264-266 (10th Cir. 1988) (rejecting claim for benefits based on "negligent misrepresentation" claim since end result would be oral modification of plan).

As a result, in recent years plan participants have increasingly relied on breach of fiduciary duty and federal common law estoppel claims as a way of circumventing the written terms of a plan. *See, e.g., Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994) (holding that although plan document unambiguously provided that participant was not entitled to supplemental accidental death and dismemberment coverage, employer's misrepresentations regarding coverage constituted a breach of fiduciary duty and estopped employer from denying coverage to participant). Indeed, it has become standard operating procedure for plan participants to assert three alternative bases for recovery when initiating an action against an employer under ERISA — a claim for violation of the terms of a plan, a claim for breach of fiduciary duty, and a

claim for promissory estoppel. As Respondents themselves acknowledged in the cross-petition they filed in this case:

> Fundamentally, claims like those the Retirees have made, for breach of promise on the one hand, and for misrepresentations (based on breach of fiduciary duty and estoppel) on the other hand, are natural alternatives. Where an employer's representations are considered to define the terms of the contract, the contract claim will be upheld and the misrepresentation claims become superfluous. Where the misrepresentations are held not to define the contract, the contract claim will be rejected but, if the misrepresentations are found to be knowing and material, the alternative misrepresentation claims will be sustained to ensure that the employer is held responsible for the harm it has knowingly caused.

Cross-Pet. at 13.

Contrary to Respondents' assertion, therefore, this case presents a scenario that is hardly unique. A group of plan participants, frustrated by the unambiguous provisions of the summary plan description provided to them by their employer, are simply attempting to circumvent those written plan terms and obtain vested medical benefits based on "misrepresentations," "misunderstandings," and "confusion" regarding the plan's terms. In holding that these claims are viable, the court of appeals has created an environment in which two of the principal tenets of ERISA — the primacy of written plan documents and the corresponding uniformity and certainty regarding a plan participant's benefit entitlement — are seriously threatened.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be heard in tandem with *Varity*.

Respectfully submitted,

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